

Has Regulation 1/2003 Failed?

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Regulation 1: a legal and cultural revolution

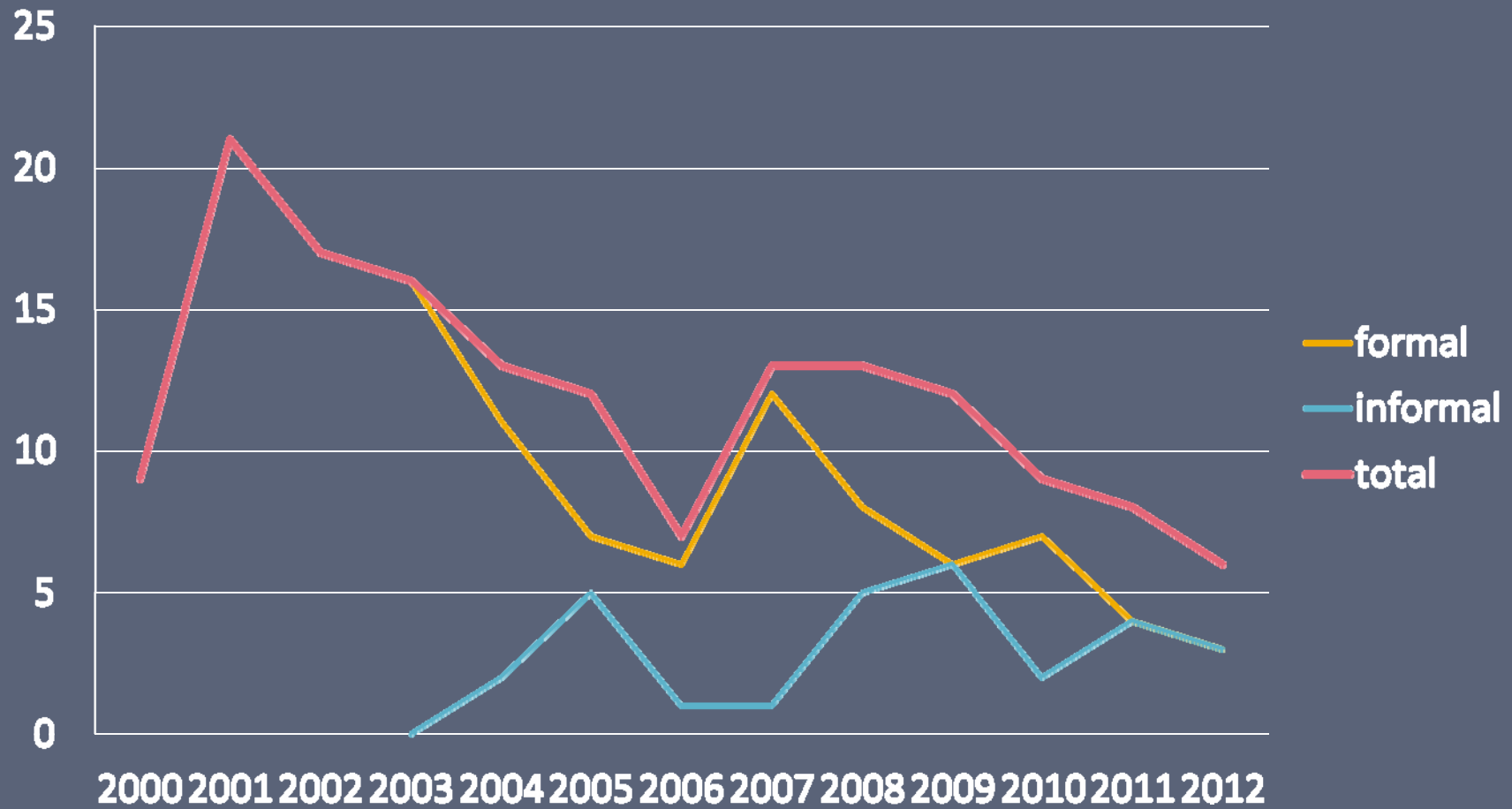
- Main effects of this Regulation:
 - Decentralised competition enforcement
 - National Competition Authorities (NCAs) have a duty to apply EU competition law (Art 3)
 - Article 101(3) has direct effect (Art 1)
 - Abolition of notification system
 - Self-assessment by parties (Art 1)
 - Networked cooperation
 - Information exchange among NCAs
 - Art 11: regarding investigations started

Expected results of Regulation 1

- Commission is pro-active in its enforcement policy
- NCAs become EU agencies enforcing competition law in the interests of the EU
- NCAs cooperate actively
- Cases are allocated to the best-placed agency
- Uniform application of competition law across the EU

Question: how many of these objectives have been met, and how?

Commission pro-active?



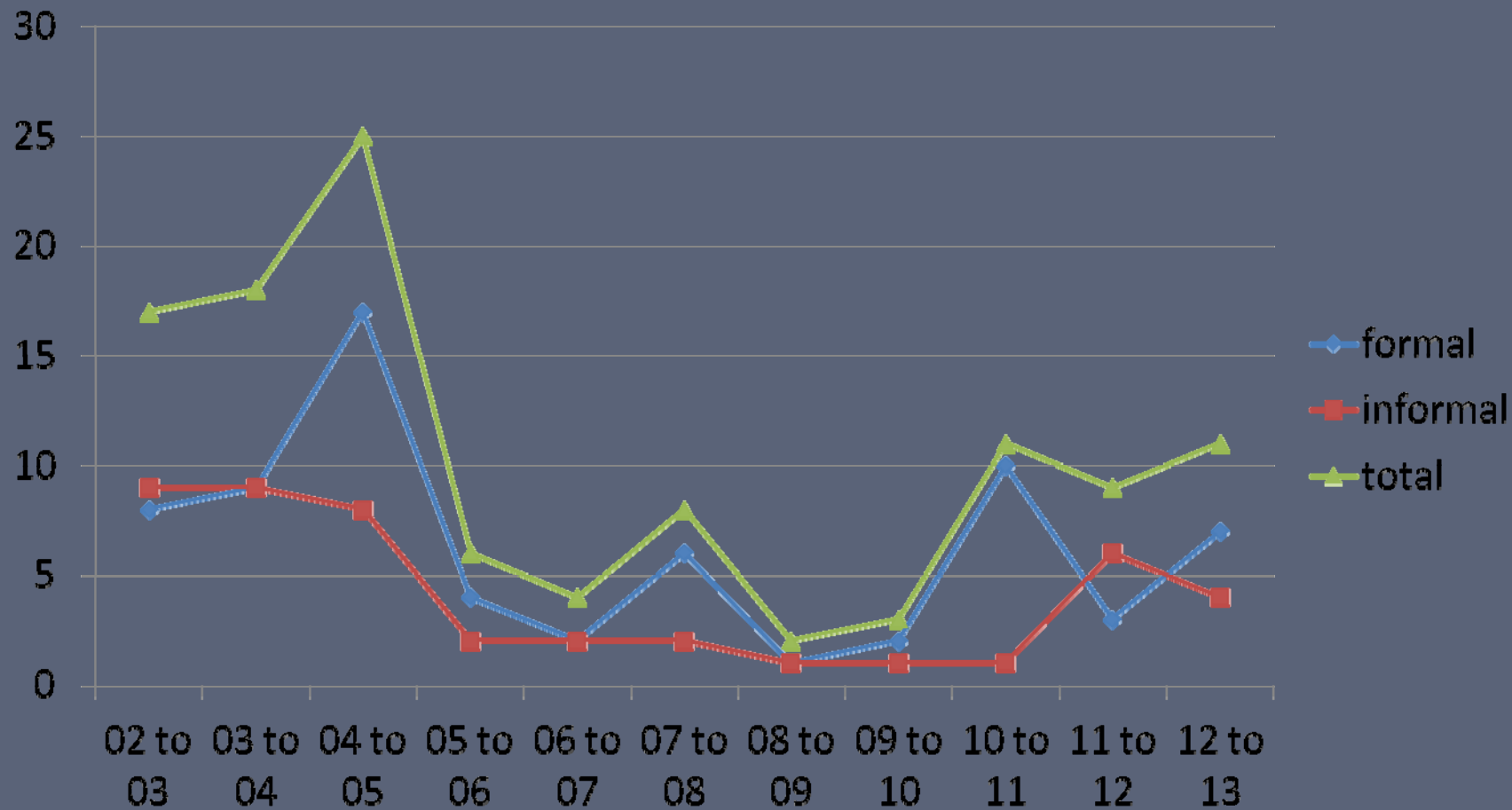
Why is the Commission not able to take more cases?

- More resources to merger and state aid cases than Arts 101 and 102?
 - Commission has a duty to act in mergers and state aid cases
- Commission spends resources coordinating national enforcement
 - Amicus briefs, discussions with national authorities
- Commission chooses more complex cases or spends more time making case (e.g. More economic analysis, closer legal scrutiny to avoid successful appeal)

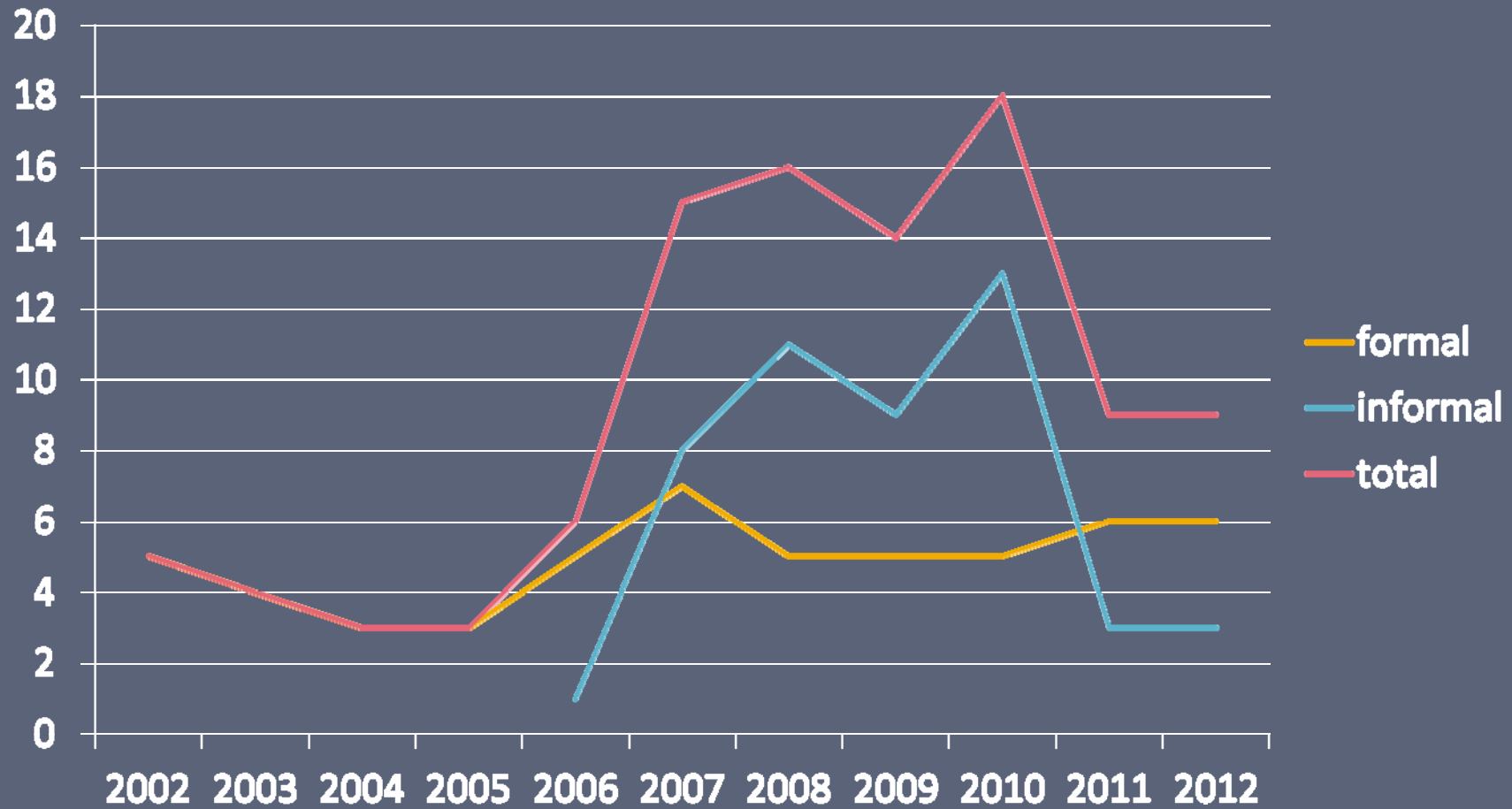
National Competition Authorities

- Commission statistics
 - Between 2004-2012
 - 1344 investigations
 - 646 envisaged decision
 - Number of actual decisions? (unreported)
 - And for the UK (2004-2013)
 - 68 investigations
 - 16 envisaged decisions

UK's Office of Fair Trading 2002-2013



Italy's NCA: decisions 2002-2012



Qualitative data

- Most cases are 'local'
 - Effect on trade is possible, but relevant markets are national
 - Most NCAs cannot impose a fine for effects outside their territory
 - Result: In EU-wide cases, decisions are split
 - Example an cartel in two Member States is prosecuted and fined by both authorities (Belgium and Germany)
 - Powers to exchange information used infrequently
 - Case allocation discussion infrequent

Is splitting up a cartel legal?

- *Ne bis in idem*: you cannot be prosecuted twice for the same offence
- *Toshiba (2012)*
 - Facts: global cartel, fine imposed by Commission & Czech Republic (before accession)
 - Question: is Czech decision in breach of ne bis in idem?
 - Answer (before accession): no, Commission had no power to impose fine for effects in Czech Republic
 - Answer (after accession): no, provided the Commission imposes a fine for effects in other states and Czech only for the fine in its country.
 - Then the two legal actions protect different legal interests

Judicial control of NCA design and powers: VEBIC (2010)

Design of Belgian NCA: prosecutor & Council

Appeals to Brussels Court of Appeal

Belgian NCA may not appear in the appeal (1st instance is a court)

Minister may support NCA

ECJ: absence of NCA in appeal proceedings does not ensure effective enforcement because the court may be 'captive' to the arguments of the appellant

No 'effective' application of EU competition law possible

Implication

- Any aspect of NCA can be tested for effectiveness
 - *Schenker* (2013): national leniency programme ‘must not undermine the requirement of effective and uniform application of Article 101.
 - *Donau Chemie* (2013): access to leniency documents to be set applying EU standards
 - What else can make an NCA ineffective?
 - Lack of powers to fine firms for conduct outside its territory?
 - Lack of resources allocated to NCA by the state?

Further controls of NCAs

- Article 11(6) Commission veto power
 - Used formally once in ten years
 - Informal ways of steering NCA decisions possible under Art 11(4)
- Tele 2 (2010): NCA may not issue decisions saying there is no infringement of competition law.
 - Would deprive the Commission of power to investigate
- Decentralisation or centralisation?

Interim conclusions

- Commission is not that more pro-active after Regulation 1
- National Competition Authorities
 - Not clear that Regulation 1 caused increased enforcement
 - Not clear that NCAs take cases which the Commission would have taken (local cartels)
 - NCA under the control of the Commission (and the ECJ), so centralisation, not de-centralisation

European Competition Network

- Official tasks
 - Case re-allocation
 - Information sharing platform
- Actual role
 - Platform for discussion among officials on individual cases
 - Development of uniform procedures (e.g. Model leniency policy)
- A.M. Slaughter 'A New World Order' (2001)
 - Networks as the new policymakers

Two views of ECN

Experimentalist governance

- NCAs reflect on the best approach to enforce competition law
- Experiments by NCAs, feedback to ECN, development of best practices
- However: also trend to uniform application (e.g. Leniency policy convergence)

Lack of legitimacy

- ECN has no legal personality: no accountability
- ECN members are not equals: peer review or peer pressure?
- ECN a poor substitute for more procedural rules