

## Cooperation between the competition authorities in the EU

Article by Philip Lowe for the 'Law in transition' journal (EBRD) - 2004

*Cooperation between the competition authorities in the EU will take an important step forward on 1 May 2004 with the application of the new Regulation 1/2003<sup>1</sup> on the enforcement of the European competition rules laid down in Articles 81 and 82 of the EC Treaty. This date coincides with the date of accession for ten new Member States. At present, the Commission and the competition authorities of the Member States are busy setting up the European Competition Network (ECN), the new framework for co-operation, and the Acceding Countries are fully involved in this process.*

### Introduction

The new Regulation 1/2003 replaces Regulation 17 of 1962<sup>2</sup>, bringing about major changes in the way the fundamental competition rules of the EC Treaty are enforced, for the benefit of consumers and the European economy as a whole. In particular, it provides for a more decentralised enforcement of Articles 81 and 82 EC. Consequently, it also calls for an increased cooperation between the Commission and the competition authorities in the Member States. In order to ensure an efficient cooperation, the Commission, the current Member States and the Acceding Countries have been working closely together over the last year in order to establish concrete working rules for the new European Competition Network.

### Direct application of Article 81(3)

The central feature of Regulation 1/2003 is the direct application of Article 81(3) EC. Pursuant to Article 81(3) EC, an agreement that restricts competition within the meaning of Article 81(1) EC can nonetheless be found legal if it involves benefits that outweigh the negative impact on competition. Under Regulation 17, the full application of Article 81(3) EC was reserved to the Commission. Undertakings were called upon to notify their restrictive agreements to the Commission in order to obtain an exemption decision from it.

Under the new regulation, agreements that fulfil the conditions of Article 81(3) EC are legally valid and enforceable without the intervention of an administrative decision<sup>3</sup>. Undertakings will be able to invoke the exception rule of Article 81(3) EC as a defence in proceedings before the Commission, Member States' courts and Member States' competition authorities.

### More effective enforcement at Member State level

The principal objective of the new Regulation is to bring about more effective enforcement of Articles 81 and 82 EC. As one major means to achieve this aim, the new Regulation opens the way for more decentralised enforcement of Articles 81 and 82 EC by Member States' courts and competition authorities. These enforcers will, as from 1 May 2004, not only be able to

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<sup>1</sup> 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, OJ L 1, 04.01.2003, pages 1-25 ; (hereafter : Regulation 1/2003 or 'new Regulation').

<sup>2</sup> Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 81 and 82 (Articles renumbered) of the Treaty, OJ 13, 21.2.1962, p. 204/62, last amended by Regulation (EC) No 1216/1999 (OJ L 148, 15.6.1999, p. 5).

<sup>3</sup> Article 1 of Regulation 1/2003.

apply the EC competition rules in their entirety but also be obliged to apply the EC competition rules to all cases that fall into their scope of application<sup>4</sup>.

In order to be ready to take on this increased responsibility for the enforcement of the common rules, Member States are under an obligation to set up competition authorities and equip them with the necessary powers where they have not yet done so.<sup>5</sup> Regulation 1/2003 also applies fully to the competition authorities of the future new Member States.

#### The European Competition Network (ECN)

The Regulation not only opens the way for a much greater involvement of Member States' competition authorities in the enforcement of Articles 81 and 82 EC, it also introduces enhanced means for these authorities to cooperate between each other and with the Commission. Indeed, an agreement or practice falls into the scope of application of Articles 81 and 82 EC where it is capable of affecting trade between Member States<sup>6</sup>. All cases that come under the EC competition rules thus have an impact that reaches beyond the territory of a single Member State. Cooperation between enforcers and coherent application of the rules are thus essential.

Accordingly, Regulation 1/2003 introduces a range of new elements that pursue the double objective of ensuring effective and coherent application of the EC competition rules by Member States' competition authorities. The new powers and obligations are part of an enhanced culture of close cooperation<sup>7</sup> between competition enforcers in the European Union to be developed in the European Competition Network (ECN).

The European Competition Network is a crucial element of the new enforcement system. In view of the application of the new Regulation as from 1 May 2004, the Commission and the competition authorities of the Member States and Acceding Countries have been working together over the recent months to set it up. This is a greatly positive experience. In particular, the team spirit shown by the competition authorities is a very encouraging sign for the functioning of the new enforcement system.

During these preparatory works, the Member States' competition authorities have in particular cooperated closely, with the Commission, in the preparation of the forthcoming Notice on Cooperation in the Network of Competition Authorities<sup>8</sup> that will set out the main network

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<sup>4</sup> Article 3(1) of Regulation 1/2003.

<sup>5</sup> Article 35 of Regulation 1/2003. When the Regulation was adopted, only one Member State did not have a competition authority yet. Some Member States are in the process of introducing legislation which grants the power to their authorities to apply Articles 81 and 82 (fully) in addition to national competition law.

<sup>6</sup> The jurisdictional criterion in Articles 81 and 82 EC is often referred to as 'effect on trade'. The Commission is in the process of issuing a new Commission Notice on this notion, together with a series of other Notices (cf. below for the Notice on cooperation in the Network). The draft Notice is currently published for consultation in OJ C 243/10 of 10.10.2003 as well as on <http://europa.eu.int/comm/competition/antitrust/legislation/>.

<sup>7</sup> This notion is laid down in Article 11(1) of Regulation 1/2003.

<sup>8</sup> Draft Commission Notice on cooperation within the Network of Competition Authorities, OJ C 243/10 of 10.10.2003; the text is also available at [http://europa.eu.int/comm/competition/antitrust/legislation/procedural\\_rules/cooperation\\_network\\_en.pdf](http://europa.eu.int/comm/competition/antitrust/legislation/procedural_rules/cooperation_network_en.pdf). The Commission has invited comments to be submitted within eight weeks from the date of publication in the OJ.

mechanisms, so as to provide guidance for undertakings subject to the competition rules. The draft Notice was published for public consultation in early October 2003.

#### Work sharing in the Network

One very important subject matter dealt with in the draft Notice are the principles governing the work sharing between the members of the network. Indeed, Regulation 1/2003 establishes a system of parallel competence in which all authorities, the Commission and Member State competition authorities, are competent to apply Articles 81 and 82 EC to cases capable of affecting trade between Member States. This fundamental orientation was taken in order to ensure efficient work sharing regarding all cases, including complex ones, without burdening the system with a rigid division of competencies.

Notwithstanding this, certain principles can be identified that will guide the authorities in the sharing of casework. These principles are set out in the Draft Notice on Cooperation in the Network<sup>9</sup>. Pursuant to the Notice, cases will be dealt with by:

- A single Member State competition authority, possibly with the assistance of competition authorities of other Member States: A single Member State authority will in general be well placed to deal with agreements or practices that substantially affect competition mainly within its territory. Furthermore single action of a Member State competition authority might also be appropriate where its action is sufficient to bring the entire infringement to an end.
- Several Member State competition authorities acting in parallel: Parallel action by two or three Member State competition authorities may be appropriate where an agreement or practice has substantial effects on competition mainly in their respective territories and the action of only one authority would not be sufficient to bring the entire infringement to an end and/or to sanction it adequately.
- The Commission: The Commission is particularly well placed if cases have effects on competition in more than three Member States. The Commission is also particularly well placed if Community interest requires the adoption of a Community decision to develop Community competition policy or to ensure effective enforcement where serious infringements would otherwise persist or remain unsanctioned.

Work sharing in the network will not mean that a large number of cases will be re-allocated between authorities. It is important to bear in mind that under the new antitrust procedures, there will be no notifications. Cases will be taken up following complaints or ex officio. In most instances the authority that receives a complaint or starts an ex-officio-proceeding will remain in charge of the case. Re-allocation of a case will be the exception.

#### Information obligations in the Network

The draft Notice on cooperation within the Network of Competition Authorities also provides additional explanations on how the members of the network will comply with their mutual information obligations laid down in Articles 11(2), (3) and (4) as well as 14 of Regulation 1/2003. Under these provisions:

- The Commission informs the Member States' competition authorities about cases that it has started under Articles 7 (prohibition decisions), 8 (interim measures), 9 (commitments), 10 (finding of inapplicability) and 29(1) (withdrawal of the benefit of a

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<sup>9</sup> Draft Commission Notice on cooperation within the Network of Competition Authorities (FN 9), paras 5ss..

block exemption) of Regulation 1/2003. This corresponds to the equivalent obligations of the Commission under Regulation 17.

- Member States' competition authorities inform the Commission of new cases started by them at an early stage of proceedings, before or without delay after the first investigative measures. In practice, this – concise – information will be fed into a common IT application that will permit access for all authorities in the network. The objective of this early information is to identify, for instance, multiple complaints, and to draw conclusions on which authority is well placed to deal with such cases at an early stage.
- The Commission consults the Advisory Committee, composed of representatives of Member States' competition authorities, prior to the taking of decisions pursuant to Articles 7, 8, 9, 10, 23 (fines), 24(2) (periodic penalty payments) and 29(1) of Regulation 1/2003.
- The Member States' competition authorities inform the Commission, no later than 30 days before the adoption of such decisions, about any decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption Regulation. This information will be transmitted via secure e-mail. Its purpose is to ensure coherent application of the EC competition rules.

#### Exchange of information and mutual assistance

Regulation 1/2003 not only envisages cooperation between the Commission and Member States' competition authorities. It also establishes new powers for the Member States' competition authorities that are aimed at enhancing their cooperation between each other. Pursuant to Article 12 of Regulation 1/2003, all authorities in the network can exchange information, including confidential information, that was collected for the purpose of applying Articles 81 or 82 EC and use such information in evidence.<sup>10</sup> Furthermore, Article 22 of Regulation 1/2003 enables the Member States competition authorities to request each other to carry out investigation measures in their respective territories. This will enhance the ability of Member States' competition authorities to deal with cases that, while their main effects are in the territory of the authority in question, require fact-finding measures in another Member State.

#### Competition authorities in the Acceding Countries

The enlargement of the European Union, with 10 new Member States<sup>11</sup> set to join in May 2004, provides further challenges and opportunities for competition cooperation. In order to meet this challenge, the accession negotiation process in the competition field has been conducted in a manner that has prepared the Acceding Countries for an active role in competition enforcement.

The requirements under the negotiations on the competition chapter were derived from the conclusions of the Copenhagen European Council in June 1993, where the criteria that applicants have to meet before they can join the EU were defined. In the economic sphere, these criteria require the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the European Union.

This 'economic criterion' of the accession negotiations was in the field of competition policy translated into a principle whereby Candidate Countries can be regarded to be ready for

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<sup>10</sup> For more ample information, cf. Article 12 of Regulation 1/2003 as well as the Draft Commission Notice on Cooperation within the Network of Competition Authorities (FN 9), paras 26 ss..

<sup>11</sup> Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Slovakia, Slovenia and Poland.

accession only if their companies and public authorities have become accustomed to a competition discipline similar to that of the Community well before the date of accession. This was considered necessary to ensure that the economic actors in these countries would be able to withstand the competitive pressures of the internal market resulting from the full and direct application of the competition *acquis* upon accession.

Consequently, the requirement of adapting to a competition discipline well before accession stemmed both from the need to preserve the internal market discipline after enlargement, and from the difficulties that would arise in Candidate Countries if they were to adapt to the application of the *acquis* from one day to the next. In order to avoid such foreseeable consequences of an abrupt application of the competition rules, a solid pre-accession preparation was considered essential.

This led the EU to conduct the negotiations not only on the basis of commitments by the Candidate Countries, but also based on a verification of a concrete enforcement of the rules. Therefore, the negotiations on competition proved more prolonged and demanding than possibly anticipated in the beginning.

In translating the principles into concrete requirements, three elements had to be in place in a Candidate Country before the competition negotiations were concluded:

- (1) the necessary legislative framework;
- (2) an adequate administrative capacity (in particular, a well-functioning competition authority); and
- (3) a credible enforcement record of the competition *acquis*.

However, these requirements were not only based on the political context of the negotiations, but also on the legal framework of the bilateral Europe Agreements that the EU had concluded with each of the ten Candidate Countries from Central and Eastern Europe<sup>12</sup>, and which already provided a solid legal basis for the accession preparation in the area of competition policy.

A basic principle in each of the Europe Agreements reflects Articles 81-82 of the EC Treaty, providing that all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition, as well as an abuse by one or more undertakings of a dominant position, are incompatible with the Agreements insofar as they may affect trade between the Community and the associated country. The Agreements also state that the basis to assess practices contrary to this principle is the criteria arising from the application of the Community competition rules, i.e. the competition *acquis*. Furthermore, the Europe Agreements have also specifically obliged the Candidate Countries to approximate their competition legislation with that of the European Union.

The Europe Agreements have constituted an essential pre-accession instrument in the competition field, by establishing a clear benchmark, facilitating internal law making and the setting up of competition authorities.

As a result, competition laws in the Acceding Countries already follow the main principles of the Community antitrust rules, as regards restrictive agreements, the abuse of dominant

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<sup>12</sup> Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Slovakia, Slovenia, Poland and Romania.

position and merger control. Competition authorities have been set up since quite some time, and they have acquired experience in applying these rules. They have also benefited from extensive training provided by the Commission, Member States and a variety of outside experts. An enforcement practice has been built up over several years and has gradually been brought to focus on cases with a more important impact on the market structure.

This process means that the competition authorities in the Acceding Countries not only have the advantage of already being used to operate under equivalent rules, but that they are also used to a culture of close cooperation. A considerable number of so called twinning projects, with Member States' competition authorities taking on long-term training commitments in Candidate Country authorities, have led to close professional contacts between the authorities. Recurring events organised jointly for all the Candidate Country competition authorities have resulted in cooperation between these authorities. Furthermore, there has been a continuous close cooperation between the authorities and their counterparts in DG Competition on a number of case-related issues.

Another important result of the process is that players in the market, as well as public authorities, have become increasingly aware of the competition policy framework, both in the national and the Community context. This can be expected to bear fruit in the coming years helping to overcome challenges relating to the full integration of companies of the acceding countries into the enlarged internal market.

The Acceding Countries have also, over the last year, been invited to the meetings between the Commission and the Member States' competition authorities. In particular, this means that they have been fully involved in the construction of the new Network. Together with the above-mentioned pre-accession preparations, this should help to ensure a smooth operation of the new Network.

### Conclusion

In conclusion, the EU faces a very exciting challenge of deepened cooperation between its competition authorities. The aim of this cooperation is to render enforcement more efficient for the benefit of the economy in general and consumers in particular. The reform is timed to coincide with the accession of ten new States, and thanks to their pre-accession preparations they are already well prepared for facing the new challenges jointly with the current Member States.