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**IMPLICATIONS OF THE RECENT REFORMS IN THE ANTITRUST ENFORCEMENT IN EUROPE FOR
NATIONAL COMPETITION AUTHORITIES**

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I. MODERNISATION – REGULATION 1/2003

1. The new enforcement system

When the Commission in 1999 launched its White paper on the modernisation of the enforcement of the EC competition rules, it had as a **major objective to maintain and where possible to improve on the effectiveness of the enforcement of the EC competition rules in an enlarged European Union**. During the numerous debates representatives of the Commission subsequently had with the academic, legal and business community in Europe, with the European Economic and Social Committee, with the European Parliament and finally, with the Council, it was clear that this objective and the methods suggested to achieve this objective were widely shared. Of course, I do not ignore that the precise modalities of the Commission's proposal to modernise the enforcement of EC competition rules were heavily debated – the reverse would rather have been a surprise - but what I above all retained from these debates, was the common desire to construct a new enforcement system that could guarantee a continued effective application of Articles 81 and 82 EC after enlargement of the European Union.

I believe that the outcome of those discussions, **Council Regulation 1/2003**, which will be applicable from 1st May 2004 onwards, **is an excellent tool** to guarantee such an effective competition policy, which will contribute to promoting the single market in a Union of 25 Member States and more. There are many reasons why I believe this is the case, but let me just focus on one of them: **the joint responsibility of the Commission and national competition authorities to enforce EC competition rules**.

Indeed, no longer will the enforcement of Articles 81 and 82 EC be the *de facto* sole responsibility of the Commission. In the new enforcement system, this responsibility is shared with the national authorities. Of course, **this joint enforcement of Articles 81 and 82 EC will only lead to an increased effectiveness of the enforcement of competition rules, if all enforcers apply the rules in a coherent way**. Regulation 1/2003 provides for mechanisms of co-ordination and co-operation between the Commission and the national authorities to achieve such coherent enforcement.

Before going into those mechanisms, it is important to underline that this regulatory framework, although vital in the whole modernisation process, is but a first step in the direction of a coherent application of EC competition rules. In order to effectively achieve our objective to increase the coherent enforcement of EC competition rules, it will be necessary to further develop the co-operation and co-ordination attitude between the European competition authorities. Considering the functioning of the European Competition Network since October last year, I have good reasons to be optimistic about that future co-operation attitude. In particular the close co-operation in the drafting of the Commission's draft notice on the network of competition authorities gave clear proof of the fact that the ECN will be the appropriate forum to ensure an effective enforcement of EC competition rules in an enlarged European Union.

2. The European Competition Network (ECN)

Let me try to give you a general idea of the different forms of co-operation that will take place under the roof of the ECN once it will have reached its cruising speed.

Let me start by the past. As you are aware, there has always been a degree of co-operation between the Commission and the Member States competition authorities in the framework of Regulation 17. That regulation created a star-like scheme that involves in particular considerable flows of information from the Commission to the national competition authorities about Commission cases and the opportunity for the national enforcers to comment – collectively - through the Advisory Committee.

Regulation 1/2003 turns the beams of this star-like system into two-way streets as Member States authorities will now also inform the Commission about their cases and consult the Commission on their draft decisions. The regulation moreover provides for the involvement of the other national competition authorities in the overall context of close co-operation as provided for in Article 11(1) of the new Regulation. Thus, the ultimate structure of the network is no longer that of a star but that of a web.

Furthermore, we no longer limit ourselves to communicating through quasi-diplomatic, formalised means like committee meetings. Close co-operation under Regulation 1/2003 involves all layers of our respective authorities, from bilateral and multilateral co-operation at case-handling level to the meetings of Directors General; from plenary meetings on horizontal issues of common interest such as assistance in Commission inspections to meetings of sectoral experts on possible policy orientations in their field of expertise.

The new web-like quality is reflected in the electronic tools put in place. The network site is similar to a website and permits access to shared information for all participants. For example, the case-handlers in the different authorities will be able to verify very easily whether there are any complaints by the same complainant on the same matter notified to the network. Of course, for confidential information, particular safety measures will be put in place.

3. Key issues related to the role of NCAs in the future enforcement system: case allocation and the intervention by the Commission to guarantee coherent application

3.1. Case allocation

Regulation 1/2003 creates a system of parallel competences for all network members to apply Articles 81 and 82 EC. That implies that the case allocation criteria as they are formulated in the draft notice on the co-operation within the ECN and in the Joint Statement the Council and the Commission made at the occasion of the adoption of Regulation 1/2003, cannot be qualified as rules for the allocation of competence.

The case allocation criteria are merely indicative criteria for the division of work between the network members. The criteria can be roughly summarised as follows: cases should be dealt with by an authority that is well placed to restore competition on the market. It follows that a single national competition authority is usually well placed to deal with agreements or practices that substantially affect competition mainly within its territory. Single action of a national competition authority may also be appropriate regarding infringements of wider scope where the action of a single national competition authority is sufficient to bring the entire infringement to an end.

Where an agreement or practice has substantial effects on competition in several territories and the action of only one authority would not be sufficient to bring the entire infringement to an end or to sanction it adequately, parallel action by two or three Member State competition authorities may be appropriate in order to ensure effective deterrence and to avoid under-punishment. Of course, such parallel action should involve close coordination between the authorities concerned in order to avoid any inconsistent outcome.

Where an infringement has effects in more than 3 Member States, the Commission will often be considered to be best placed to deal with a case.

These indications of case allocation primarily have to guide complainants, leniency applicants and competition authorities, thus ensuring that the vast majority of cases are dealt with by a well-placed authority from the very beginning. Other authorities, equally competent and possibly also well placed, will in those circumstances abstain from acting. The situation where one authority starts a case that is then further pursued by another (a situation often referred to as “re-allocation”) should therefore be very rare. It is however not to be excluded that over the first months of the new enforcement regime the allocation system will be tested by so-called forum shoppers. It is therefore of the utmost importance that the allocation criteria we agreed upon are strictly applied, definitely in those first months, where all of us, enforcers, legal and business community, will have to learn operating under the modernised enforcement regime.

How is work sharing going to work in practice? First, 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*. All authorities, when they start a new case, are obliged to inform the network. An indicative ‘case allocation period’ of two months is foreseen. This will permit the network to sort out a situation where a case has been started by an authority that does not seem to be well placed to deal with it. The Regulation permits all authorities to close or suspend proceedings for the purpose of re-allocation. Once the issue is resolved during the indicative case allocation period, the case will, in principle, remain with the same

authority up to the final decision, unless a serious problem arises that would lead to an intervention by the Commission.

Before elaborating on that latter scenario, allow me to emphasize that within the modernised enforcement system, each authority is free to decide for itself whether it wants to deal with a given case or not, based on its own enforcement priorities. This goes both for the NCAs and for the Commission. That being said, I assume the efficient enforcement of EC competition rules throughout the European Union would profit from a reasonable degree of co-ordination regarding the enforcement priorities of the network members.

3.2. The intervention by the Commission to guarantee coherent application

In the modernised enforcement system, the Commission, as the guardian of the EC Treaty, has the ultimate, but not the sole responsibility for developing competition policy and for safeguarding efficiency and consistency in the application of the EC competition rules. Therefore, the instruments of the Commission are not identical to those of the NCAs. The Commission will however exercise the additional powers it has been granted to fulfil its responsibilities with the utmost regard for the co-operative nature of the network.

This paraphrase of point 9 of the Council and Commission Joint Statement on the functioning of the ECN summarises the role of the Commission in the new enforcement system extremely well: the Commission acting as *primus inter pares*.

Applied to the case allocation, this role implies that the Commission will primarily, but not exclusively, deal with cases affecting more than three Member States. The responsibilities just referred to should also allow the Commission to take up cases that are potential precedents in order to set policy for the internal market, particularly when a new competition issue arises, and to ensure coherence or to compensate for a lack of enforcement in parts of the Community where that is really necessary because serious infringements would otherwise persist or remain unsanctioned.

That same logic underlies the possibility for the Commission to open proceedings with the effect of relieving NCAs of their competence to apply EC competition rules. The Commission has such power already for more than 40 years and everyone will agree that it was never abused. So why would that be different in the future? That ultimate safety valve is simply necessary for the Commission to take up its responsibilities I just referred to: ensuring a coherent and effective enforcement of the EC competition rules. In order to comfort NCAs, the Commission agreed to describe in the Joint Statement I referred to earlier on, the situations in which it can make use this ultimate remedy, laid down in Article 11(6) of Regulation 1/2003.

- (a) *Network members envisage conflicting decisions in the same case;*
- (b) *Network members envisage a decision which is obviously in conflict with consolidated case law; the standards defined in the judgements of the Community courts and in previous decisions and regulations of the Commission should serve as a yardstick; concerning facts, only a significant divergence will trigger an intervention of the Commission;*

- (c) *Network member(s) is (are) unduly drawing out proceedings;*
- (d) *There is a need to adopt a Commission decision to develop Community competition policy in particular when a similar competition issue arises in several Member States;*
- (e) *The national competition authority does not object.*

This commitment by the Commission clearly demonstrates that it will limit its intervention in order to enforce Articles 81 and 82 for developing EC competition policy or to compensate for a lack of enforcement.

4. CONCLUSION

I consider the co-ordination and co-operation mechanisms which are set in place to channel the joint enforcement of EC competition rules to be appropriate to safeguard both the coherent enforcement of the EC competition rules throughout the European Union and the autonomy of the NCAs to determine their enforcement priorities. Combined with the right spirit of co-operation, I am most confident that we are ready for the modernised antitrust enforcement regime in Europe.

II. RECAST EC MERGER REGULATION

Turning now to the recast of the merger Regulation, I would like to touch upon the implications of the recently adopted reform of the Merger Regulation upon National Competition Authorities (NCAs), and focus my remarks on a couple of issues:

- i)* the need for coordination between the Commission and NCAs within the framework of the new streamlined referral system,
- ii)* the impact, if any, that the Community new analytical framework for the assessment of mergers may have on domestic merger legislations still based on the dominance test.

i) The streamlined referral system– Rationale of the reform: enhancement of subsidiarity

The need to secure consistent application of Community rules and coordination between the Commission and National Competition Authorities (NCAs), which is at the core of the recent reform in the field of articles 81-82, may, at first sight, appear less relevant in merger control. In the latter, because of the one stop shop principle, Community and domestic legislations regarding merger control have no overlapping scope. Nonetheless, in particular in the light of

the reform of the referral system coordination will have a more important role also in the field of merger control.

The overall purpose of the new streamlined referral system is to put in place a more rational corrective mechanism of case allocation between the Commission and Member States based on subsidiarity for cases that would be dealt with more efficiently by another authority than that allocated jurisdiction on the basis of the turnover thresholds. This system aims in particular at tackling the problem of "multiple filing", i.e. notification to various competition authorities within the EU while preserving the major assets of EC merger control, that is one-stop-shop, expediency, legal certainty and administrative efficiency. This implies that the authority or authorities best-placed to assess the impact on competition of a merger should in principle deal with such a case. At the same time merging companies should have the option of determining, at as early as possible a stage, where jurisdiction for scrutiny of their deal will ultimately lie, thereby avoiding legal uncertainty, time delays and unnecessary extra-costs because of multiple filing obligations.

From this perspective, the reform of the EC Merger Regulation shares with the Modernisation of the rules implementing articles 81 and 82 EC the same underlying logic. In both cases, the reforms are meant to set up more efficient competition enforcement systems, with a view to securing a more rational allocation of tasks between the Commission and NCAs based on subsidiarity.

The new streamlined referral system – Mechanics - Referral procedures are simplified

In what way will the new referral system enhance the re-allocation of cases between the Commission and NCAs? In essence, the Merger Regulation's provisions concerning referral of cases from the Commission to Member States and vice versa have been simplified and rendered more flexible. The novel features of the system are mainly the following:

i) the referral of mergers from MS to the Commission or viceversa can occur at a pre-notification stage, i.e. before a formal filing has been made in any EU jurisdiction, based on a procedure triggered by a reasoned request submitted by the undertakings concerned (*all Member States concerned must consent to the referral to the Commission in order for a case to fall under exclusive Community jurisdiction; failure by a MS concerned to react to a referral request in pre-notification stage within 15 Working Days is tantamount to approval. However, each Member state concerned by a referral request is granted an extensive veto right enabling it to block the procedure altogether*).

ii) Requirements for referrals have been rationalised and streamlined. In pre-notification referrals to the Commission, the only requirement is multiple filing, i.e. reviewability of the case in at least three MS (*by contrast, conditions for effecting post-filing referrals to the Commission remain stricter and are similar to those under the previous system, except that significant effect on competition instead of threat of dominance needs to be proved*). As to referrals to MS, it suffices that a community merger may (pre-notification) or threatens to (post-filing) significantly affect competition within distinct market in a MS (*while under the previous system the threat of dominance had to be proved, unless the market affected by the merger did not constitute a substantial part of the common market*).

iii) The Commission has a "right of initiative, i.e. it can invite Member States to make referrals, as well as invite them to request the Commission to refer cases to them.

As a result of the above described reform of the Merger regulation's referral system, the number of cases subject to re-allocation between the Commission and NCAs should increase. Referrals will no more be re-attribution devices working only at the fringe of the system, they would be rather at the core of the jurisdiction rules, thus possibly affecting a larger number of cases, in particular having regard to the expected advantages in terms of reduction of costs and burdens stemming from pre-filing referrals. Against this background, cooperation between the Commission and NCAs for the purpose of the process of re-attribution of cases becomes a crucial issue.

Consistency in applying Community and domestic merger control rules

But also consistency in applying equivalent standards of assessment is no less important. Under articles 81-82, the need for a consistent enforcement of community rules across the EU by NCAs and the Commission stems from the fact that they will be applying the same community provisions. By contrast, cases attributed to the Commission or to NCAs as a result of a referral (pre or post-notification) are treated under either community law or national law. However, from a substantive stand-point, the problems are similar: like in antitrust, also in the field of merger control in essence NCAs share with the Commission a common responsibility, as they have to secure the competitive structure of the marketplace in the EU to the benefit of consumers, regardless of the provisions they apply.

Within a networking system where antitrust law and policy are regulated and enforced at both Community and national level, consistency in the application of competition rules is the priority. Consistency implies first that Community competition rules are applied in a convergent manner within the EU territory, irrespective of the agency that applies them. It also implies that each national agency should attain an equivalent level of competition enforcement in the territory under its own jurisdiction, so as to create a level playing field. This is why the interaction between EC and domestic merger control rules is a pertinent issue despite the lack of concurrent jurisdiction.

In relation to community mergers eligible for referrals to MS, it is for the Commission to ascertain that the recipient NCAs will be sufficiently equipped, having regard in particular to resources, investigative and enforcement powers, past record of enforcement of competition rules, to properly scrutinise the case with rigour and independence. In this respect, it is worth reminding that in its recent judgement *Philips v The Commission* ("the *SEB/Moulinex* judgement"), the Court of First Instance has made it clear that the Commission's discretion in deciding whether or not to refer a case under Article 9 ECMR is "not unlimited", noting in particular that referrals should not be made where "it is clear" that the referral could not "safeguard or restore effective competition on the relevant markets; and the Commission should not lose sight of the importance of preserving the ECMR's "one stop shop" principle and its attendant benefits.

The role of the network in merger control

Drawing a parallel with the Network being established in the context of the Modernisation Reform seems sensible. Indeed, similar needs arise in the field of mergers following the review of the case allocation system:

i) For the purpose of rapidly processing a potentially higher number of referral requests, in particular those taking place at a pre-notification stage, and having regard to tight deadlines of merger control, the network should first of all secure timely exchange of information and consultation between its members.

ii) Moreover, and maybe more importantly, the network should also function as a forum for discussion and coordination of its members with respect to those cases where identifying the best placed jurisdiction is not a straightforward issue.

[For certain categories of cases it is relatively straightforward identifying who should be the best positioned agency to treat these cases In principle, the Commission is naturally best placed to deal with cross-border cases, namely first and foremost those multi-jurisdictional mergers affecting competition in geographic markets that are global, EEA-wide or otherwise wider than national.

On the other hand NCAs may be better placed to deal with those cases affecting competition in local, regional or other clearly national markets.

There would still remain a important number of cases whereby establishing the best-placed agency is less straightforward. For instance, it may be that the Commission is better placed to look at cases that engender widespread competition concerns over a series of national or narrower than national markets (which end up affecting countries as a whole); the preference for the Commission treating such cases is explained by the need to secure consistent scrutiny across the different countries and address such concerns by way of coherent remedies, if need be. Parallel proceedings would be indeed very difficult to coordinate, not to mention the duplication of controls and the extra costs relating to multiple filings. On the other hand, it could be argued that NCAs, may be in a position to properly scrutinise those cases which, despite affecting competition in more than one country, have a clear economic and competitive focus in one single country. The same could be said for those concentrations which engender a significant impact being limited to a single national market. The NCA of the country affected by the transaction may be better placed to conduct the investigation given the geographic scope of the market However, the Commission may be better placed to treat these cases if they threaten to cause nation-wide foreclosure effects, or harm other fundamental community interests, such as in the context of market liberalisation or where markets are in the process of becoming wider than national].

In this respect, the Commission is currently working at a draft notice precisely designed to provide guidance in this field.

Also, the referral system has been shaped in such a way to avoid deadlock situations. Regarding in particular pre-filing referrals to the Commission, a veto power is granted individually to MS concerned by the referral request, enabling each of them to block the procedure altogether. On the other hand, each MS bears a lot of responsibility vis-à-vis the other members of the network. This is why we trust the veto will be exercised with a sense of responsibility by MS and based on subsidiarity considerations, that is when a MS is convinced of being in a better position to deal with the case given the location of the competitive impact of the transaction (market national or narrower than national), and the ability of the NCA to address the competition concerns resulting from the concentration by means of effective investigative and enforcement powers.

However, it cannot be excluded that situations of disagreement or uncertainty would need to be resolved on a consensual basis by the members of the network.

In this context, the ECA (the European Competition Authorities working group dealing with mergers) functions already as a forum within which COM and Member States engage in timely consultation over multiple filings. Thanks to this network three cases have been jointly referred to the Commission under article 22 of the current Merger Regulation

(Promatech/Sulzer, Ge/Unison and GE/Agfa). While the ECN, developed for antitrust, would, for avoidance of cumbersome and unnecessary duplications, be the ideal candidate for developing the merger network, guidance and inspiration from the ECA past experience will be highly considered.

ii) The new analytical framework – does the new substantive test put at risk convergence with respect to those countries still applying the dominance test?

The issue of whether the introduction of the new substantive test may undermine legal certainty by dissipating the Community past case-law in the field of dominance has been carefully considered by both the Commission and the Council in the context of the deliberations bringing to the adoption of the reform. We have come to the conclusion that there is no such a risk.

Dominance is the main instance of the SIEC test – Legal certainty is preserved

The new test will maintain, by referring to a “significant impediment to effective competition”, in particular resulting from the creation or the strengthening of a dominant position, the concept of dominance as the main standard for assessing the compatibility of mergers with the common market. By keeping the concept of dominance unaltered, the new test will preserve the *acquis* and, thus, the guidance that can be drawn from past decisional practice and case law. As a result, previous decisions and judgements could still be relied upon as precedents when considering whether a merger is likely or not to create or strengthen a dominant position. Such guidance would be essential for the Commission and for all interested parties since single or collective dominance would remain of particular relevance for the assessment of the vast majority of mergers.

Thresholds of intervention remain untouched

The test could not be interpreted as a lowering of the intervention threshold. Indeed, the “SIEC” already constitutes the base-line threshold for assessing the compatibility of mergers with the common market, in particular for interpreting the concept of creation or strengthening of a dominant position. Irrespective of the type of competitive harm, the Courts would therefore require, as they have done up to now, evidence of the significant detrimental effect on competition caused by the merger under consideration. The standard of incompatibility of mergers will therefore remain the same as before, as would the underlying rationale of EC merger control, that is, to prevent undertakings to acquire significant market power through mergers.

All anticompetitive scenarios are covered – no gap

The new test clearly «closes» this potential gap by covering situations of non-collusive oligopoly through the notion of « significant impediment to effective competition ».

Guidance is drawn from guidelines

Perhaps even more importantly than the precise wording of the test enshrined in the Merger Regulation, what the Commission and the Courts will have to interpret this test and apply it in practice. In this regard, the Commission's forthcoming Notice on Horizontal Mergers will contain a very comprehensive and clear set of guidelines on the interpretation and practical

application of the substantive test in horizontal merger cases, thereby providing more legal certainty and better guidance for all concerned.

Risks of divergences with those countries still employing the dominance test?

The discussion about the substantive test easily becomes somehow “abstract” risking to lose sight of the substance of the problem. The crucial question is whether, irrespective of the labels, the substantive tests applied by Competition agencies enable them to tackle all and the same anticompetitive scenarios. As long as the substantive tests applied by Competition agencies across the EU aim at covering all mergers detrimental to consumers, including those giving rise to unilateral effects in non collusive oligopolies, there is no risk of divergence in merger control scrutiny across the EU.