

# **"The Commission's position within the network"**

by Alexander Schaub

## **I. Introduction**

Three years ago, the Commission adopted a White Paper in which it proposed to abolish its monopoly for the application of Article 81(3). A spirit of decentralisation – some preferred "subsidiarity" – inspired this proposal. It is not common that a monopolist decides on its own initiative to get rid of its prerogative and to share its powers with others.

There were two reasons for the Commission to do so: first it believes that it is desirable to involve more national bodies in the application of Community law in order to bring that law closer to the citizen and to increase its acceptance and second it remains convinced that in an enlarged Community, a really efficient protection of competition cannot rely on a single institution.

This proposal, which in the meantime is rather broadly accepted, has been the subject of criticism from two angles:

- some, mainly the European Parliament and industry circles, warned against a “renationalisation” of competition law. They feared that one of the pillars of the Treaty was being given back to Member States. They understood the proposal as an intention from the Commission to withdraw from the field of competition enforcement and to limit itself to issuing block exemption regulations and guidelines.
- others heavily criticised the so-called "control" the Commission would have on National Competition Authorities (hereafter NCAs). They denounced the “supervision” under which the Commission would like to place NCAs.

The purpose of this paper is to examine the Commission's position within the network. It will show that the Commission is by no means retreating from the field of competition but that its intervention will be better focussed and more effective and

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that it will work in much closer cooperation with national enforcement authorities. In the new system, the Commission will be an enforcer amongst others but it will retain a particular responsibility for the functioning of the network.

## **II. The Commission will be part of a network of public enforcers**

The Commission will remain an active enforcer of the rules. By Article 85(1) of the EC Treaty it is entrusted with the task of ensuring the application of the principles laid down in Articles 81 and 82 of the Treaty. Article 85(1) states:

Without prejudice to Article 84, the Commission shall ensure the application of the principles laid down in Articles 81 and 82. On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, who shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.

The role of the Commission as an enforcer was recently underlined by the Court of Justice in the Masterfoods case<sup>1</sup>. The judgement recalls the content of Article 85(1) and concludes that “the Commission is entitled at any time to adopt individual decisions under Articles 81 and 82 of the Treaty.” It follows that the Commission can never be precluded from taking a decision in a given case.

This judgement is based on the Treaty itself. The reform of regulation 17 could not and will not harm the role of the Commission in this respect. The aim of the reform is on the contrary to step up the enforcement of EC competition rules by eliminating the routine examination of notifications and thus allowing the Commission to focus on the prosecution of serious infringements.

However, in a system of parallel competences, the Commission will deal with cases when it is better placed to do so than other members of the network.

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<sup>1</sup> Judgement of the Court of Justice of 14 December 2000 in case C-344/98 Masterfoods, [2000]ECR, I-11412.

## **1. A greater contribution of National authorities to the application of EC law**

In the current system, national competition authorities do not contribute as much as they effectively could to the enforcement of EC competition rules. First of all, they are not yet all empowered to apply EC law<sup>2</sup>. Second, in the countries where competition authorities can apply EC law, they very rarely do so<sup>3</sup>. This can largely be explained by the existence of the exclusive competence of the Commission to apply Article 81(3). Complainants lodge their complaints with the Commission in order to avoid a dilatory notification or they bring their case to the national authority, but under national competition law.

Where EC competition law is applied by national authorities, it is mainly in parallel with national law or to supplement national competition law where it does not apply to certain sectors. This explains why the enforcement of EC competition law relies essentially on the Commission.

In the new system, this will significantly change. National competition authorities will all be fully empowered to apply Community law and will have an obligation to apply Community law when agreements or practices affect trade between Member States.

Moreover, their independence will be reinforced by applying Community law and being part of a network of competition authorities. The pressure that certain political or economic interest groups could try to exercise on them will be discouraged by the fact that consultation will take place in the network and that the interpretation of the law given by the authorities will have to comply with the case law of the Court of Justice.

Their more active contribution to the enforcement of Community rules will be of great importance for the protection of competition. They are close to the markets and generally have a good knowledge of them. They will act in order to protect consumers

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<sup>2</sup> UK, Ireland, Luxembourg, Finland and Austria are not yet empowered to apply EC law.

<sup>3</sup> Since the notice on cooperation of 1997, NCAs inform the Commission when they take decisions applying EC competition law. On average, 10 decisions applying Community law are taken per year by all national authorities.

in their territory, i.e., as a general rule, prosecute infringements which have substantial effects on their territory. The Commission would therefore deal with cases having effects in one Member State only to compensate for a lack of enforcement or if proceedings are unduly drawn out.

## **2. Parallel action of national authorities or action of the Commission?**

The Commission will generally be considered better placed to deal with a given case where, in order to solve a competition problem, it is required to adopt a decision that is enforceable in a number of Member States. In the new system Commission decisions are still the only decisions that can be enforced throughout the Community.

In order to bring an end to infringements having substantial effects in more than one Member State and to sanction them appropriately, there are two different options; either several national competition authorities act in parallel or the Commission intervenes. The proposed regulation as well as the draft notice on the functioning of the network take a pragmatic approach on this aspect. Some flexibility has to remain in the system. Companies argue in favour of an automatic one stop shop, i.e. the exclusion of parallel action as a matter of principle. However, parallel action can be an efficient way to solve certain competition problems, in particular when they are regional in scope. In an enlarged Community, it will be neither desirable nor feasible to allocate all cases to the Commission that cannot be dealt with by a single national authority.

On the other hand, where parallel action involves more than three authorities, it is very unlikely that it will be efficient. These cases should therefore generally be dealt with by the Commission.

In order to allow the Commission to enforce the rules efficiently, the proposed regulation creates several types of decisions. First, it takes over from Regulation 17 the power to bring an end to an infringement. Article 7 of the Regulation also spells out clearly that the Commission has the power to impose any remedy necessary, including structural ones. The latter aspect has given rise to many discussions. It is not however, as many argued, a new tool. The Commission already had this power under

Regulation 17 and has sometimes made use of it<sup>4</sup>. As in the current system, it will have to be exercised under the control of the Court of Justice and will be subject to the principle of proportionality. Changes to the structure of an existing company, which most commentators had in mind, will happen only in extreme cases: the Commission would only impose such a remedy if no other solution with equivalent effect exists.

Secondly, Article 9 creates a new tool for the Commission which was inspired by the “consent decrees” in the American system: decisions accepting commitments. These decisions would allow the Commission to close proceedings by accepting commitments offered by the parties. This can be an efficient way to restore competition on a market without having to conduct a proceeding to its end. It would solve the problems identified more speedily and would save the costs of a proceeding. These types of decision are only appropriate in cases where the Commission does not impose fines.

### **3. The Commission as policy maker**

Other cases suited for the definition of Community competition policy should also be dealt with at European level. . The Commission has always used individual decisions to set policy in new areas. In the field of economic law, cases are essential to draw policy lines. It is only when sufficient experience has been gathered that the adoption of an act of an horizontal nature can be envisaged. The special responsibility of the Commission for the setting up of competition policy was recently recalled by the Court of Justice. In the Masterfoods case, the Court held that:

“the Commission, entrusted by Article 85(1) of the EC Treaty with the task of ensuring the application of the principles laid down in Articles 81 and 82 of the Treaty, is responsible for defining and implementing Community competition policy.”

The new system cannot put into question the role of the Commission as policy maker. Being a Community institution, the Commission keeps a special responsibility to define Community competition policy. This does however not imply that national authorities cannot deal with cases raising new issues of law. It simply means that,

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<sup>4</sup> See Commission Decision Warner-Lambert/Gillette and BIC/Gillette, OJ 1993 L 116, page 21.

See also judgement of 17.11.1987, Joined Cases 142/84 and 156/84, British-American Tobacco and R.J. Reynolds, [ECR 4487].

irrespective of the geographic scope of a case, the Commission could be lead to deal with a given case in order to set policy for the whole Community by the adoption of a Community act.

To that effect, the proposed regulation includes a special instrument: decisions finding inapplicability of Article 81 or 82 to an agreement or practice. These decisions, foreseen in Article 10 of the proposed regulation, will be taken in the Community public interest. They will be taken by the Commission on its own initiative and not, like exemption decisions under Regulation 17, upon notification of companies. They will complement guidelines and block-exemption regulations.

Article 7 of the proposed regulation also clarifies that the Commission can have an interest in taking a prohibition decision, even if an infringement has already been brought to an end and if it does not impose sanctions. This is in particular the case where there is a need to set policy vis-à-vis a certain type of restriction. Prohibition decisions are very important to draw the line between what is prohibited and what is not.

All these decisions, being Community acts, will have the effects described by the Court of Justice in the case law<sup>5</sup>. National Courts or authorities will not be allowed to contradict Commission decisions without, as far as national courts are concerned, making a reference to the Court of Justice. For the sake of clarity, the proposed regulation codifies this case-law in Article 16. The numerous comments made on these judgements show how necessary it is to have Article 16 in the new Regulation.

#### **4. An enhanced role for the Advisory Committee**

All Commission decisions will be taken in close cooperation with the national competition authorities. The Advisory Committee will be consulted as it is at present but its contribution will be given more weight. Firstly, because it will be composed of members of competition authorities that bring with them the daily experience of enforcing Community competition rules making their contributions even more valuable.

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<sup>5</sup> See judgement of 14.12.2000, Case C-344/98, Masterfoods, of 28.2.1991, Case C-234/89, Delimitis, [ECR 1991-I, page 935] and of 22.10.1987, Case 314/85, Foto-Frost, [ECR page 4199].

Secondly, the regulation itself will strengthen the Committee's position. Article 14(5), as drafted in the Presidency compromise text, states that:

“The Commission shall take the utmost account of the opinion delivered by the Advisory Committee. It shall inform the Committee of the manner in which its opinion has been taken into account”.

The text also provides for the publication of the opinion at the request of the Committee. These elements will give more weight to the opinion of the Advisory Committee.

## **II. The Commission will have a particular responsibility for ensuring an efficient functioning of the network**

In a system of parallel competences, new issues arise: cases have to be dealt with efficiently and in a consistent manner. The Commission, as the guardian of the Treaty, has a special responsibility in this respect and enjoys therefore certain powers to fulfil its duties. These powers will however be exercised in close cooperation with national competition authorities which will themselves contribute both to an efficient allocation of cases and to a consistent application of the rules.

### **1. The Commission's role in the allocation of cases**

In the new system, case allocation will not be mechanical but flexible. Criteria for allocation will be qualitative in nature. In most cases the authority receiving the complaint or the application for leniency will deal with it and there will be no discussion within the network on the allocation of the case. But it can happen that the same case be brought to the attention of several authorities simultaneously or successively.

The proposal creates a mechanism in order to avoid unnecessary parallel proceedings and to ensure, to the extent possible, a one stop shop. Article 13 states:

1. Where competition authorities of two or more Member States have received a complaint or are acting on their own initiative under Article 81 or Article 82 of the Treaty against the same agreement, decision of an association or practice, the fact that one authority is dealing with the case shall be sufficient grounds for the others to suspend the proceedings before them or to reject the complaint. The Commission may likewise reject a complaint on the ground that the competition authority of a Member State is dealing with the case.

2. Where the competition authority of a Member State or the Commission has received a complaint against an agreement, decision of an association or practice which has already been dealt with by another competition authority, it may reject it.

Article 13 forms a legal basis to reject a complaint on the grounds that another authority is dealing with, or has dealt with, the same case (i.e. same practice or agreement on the same market by the same companies). It is however only a faculty, and there is no rule defining which authority has to close or suspend its proceedings. This leaves scope for appreciation of the peculiarities of each individual case. This flexibility is important; if a complaint was rejected by a national authority after thorough examination, another national authority may not want to redo the assessment. On the other hand, if a complaint was rejected because the national authority was unable to gather evidence of the infringement, another national authority may wish to carry out its own investigation.

Given the voluntary character of the provision, disagreement may arise between two authorities. In that case, the competition authorities concerned should endeavour to find a workable solution by engaging in direct exchanges. This should nonetheless be limited in time. In order to give certainty to companies involved and to ensure an effective and swift protection of competition, case allocation should be settled as quickly as possible. The network could work with an indicative deadline (say, up to three months) during which cases should normally be allocated. This could of course not prevent the reallocation of the case if new facts arise and justify such a reallocation (e.g. a cartel that was thought to be national is of a wider scope or vice versa).

If discussions between authorities involved does not lead to a satisfactory solution, there is a need for a referee. In the proposed system, it can only be the Commission. If there is sufficient Community interest in doing so, the Commission will open proceedings with the effects of Article 11(6) and bring an end to the disagreement over case allocation. This will rarely happen but it is needed as a safety valve in the system.

## **2. The Commission's duty to ensure a consistent application of the rules**

The existence of several decision makers raises necessarily the question of consistency of the decisions taken. In the very beginning of the new system, the risk of diverging



decisions cannot be excluded given that each authority has its own traditions and legal culture. Given that there is no integrated judicial system in the Community, the responsibility for ensuring consistent application of the rules will have to be ensured by the authorities themselves.

To that effect, the proposal sets out an obligation of the national authorities to inform the Commission prior to the taking of decisions. The information sent to the Commission should be made available to all national competition authorities at the same time.

The scope of the obligation to inform the Commission is defined by Article 11(4) of the Council regulation. This provision states:

“No later than 30 days before adopting a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption regulation, the competition authorities of the Member States shall inform the Commission. To that effect, they shall provide the Commission with a summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the proposed course of action. This information may also be made available to the competition authorities of the other Member States. At the request of the Commission or the competition authority of a Member State, the acting competition authority shall make available other existing documents necessary for the assessment of the case.”

The obligation to inform is limited to three types of decisions: prohibition decisions, decisions accepting commitments and decisions withdrawing the benefit of a block-exemption regulation. Decisions ordering interim measures are not submitted to an obligation to inform because they are not definitive and cannot prejudice the outcome of the proceedings. Decisions rejecting complaints or closing ex-officio procedures are not subject to consultation because they do not change the legal position of the parties. They only state that a given authority will not proceed with a case. This does not preclude other authorities to investigate the matter. Prohibition decisions on the other hand have severe consequences for companies and create situations that are difficult to undo. Decisions withdrawing the benefit of a block exemption regulation are also important because they allow a national body to disapply a Community act.

In practice, NCAs will have to send to the Commission, at the latest one month before the adoption of the decision, a document setting out the content of the envisaged course of action. For prohibition decisions, this will often be the national equivalent of

a statement of objections (this document defines the ultimate scope of the prohibition, in accordance with the general principle that the parties must be given the opportunity to answer the objections before the final decision is taken). For decisions accepting commitments, it will be a document setting out the competition concerns identified by the NCA and the proposed commitments to solve the competition problems.

The information will be shared within the network by all authorities. They will all be able to read decisions and make their contribution to consistent application. They will be well placed to do so as they might have dealt with similar cases before.

In this context, there are two possible risks of inconsistency: several authorities acting in parallel may come to different outcomes or a national authority may adopt a decision contrary to the established case law. To assess this later aspect, the case law of the Court of Justice, block-exemption regulations and decisions of the Commission should serve as a yardstick.

Where necessary, following the information pursuant to Article 11(4), a discussion can be held in the Advisory Committee. This discussion may take place at the request of a competition authority or of the Commission. It will not lead to a formal opinion but simply to an exchange of views. This should in principle be sufficient to ensure consistent application of the law.

However, if no agreement can be found and if there is a persistent risk of inconsistent application, it will ultimately be for the Commission to ensure that the law is applied consistently. It will be able to do so by opening proceedings and de-seizing national authorities pursuant to Article 11(6). This should however only happen after having duly consulted with the Member State(s) concerned, having explained the need for intervention and having given an opportunity for discussion in the Advisory Committee.

The Commission will not let itself be turned by companies into an appeal body for case allocation or for decisions of national authorities. The essence of the mechanism of consultation is to avoid having companies play the Commission against NCAs. It is already the case that companies and their lawyers, when they face proceedings at national level, try to involve the Commission.

Companies should however not have any right to force the Commission to start proceedings pursuant to Article 11(6) in order to de-seize national authorities. This decision will only be made on the own initiative of the Commission on the basis of the information received from the authorities and the exchanges carried out.

After the adoption of a decision by a national authority, the Commission will normally not contradict national decisions if consultation has taken place. Given the scope of the obligation to inform, this means that the Commission should normally not adopt a decision more favourable to the companies concerned than the one adopted by the NCA. On the other hand, it will not have to take account of rejections of complaints made by national authorities.

In a system of decentralised application of Community law, the Commission will have a new role to play: it will need to ensure that case allocation functions properly and that the rules are applied consistently. This will have to be done in close cooperation with national authorities.

#### **IV Conclusion**

The proposal abolishes the monopoly of the Commission under Article 81(3) but does not limit its role in the field of competition policy nor re-nationalise competition law. The aim of the whole reform is to bring Community law closer to the citizen and to improve the protection of competition by involving more enforcement bodies.

The abolition of the monopoly will change the position of the Commission. In the current system the Commission has a prominent role by law, because the monopoly in itself ensures that cases are brought to its attention. In the new system, its strength will directly depend on the quality of its intervention. If it is credible as an enforcer, detects and successfully prosecutes infringements and maintains or efficiently restores competition on the market, it will be respected and feared by companies engaging in unlawful activities. If it plays its role of referee with moderation and equity, it will not be contested by national authorities. This is the new challenge that the Institution will have to face.