

Oxford Competition Policy Conference

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Meeting the Challenge of Modernisation

Ladies and Gentlemen,

I am very pleased to be here this afternoon to discuss with you about the implementation of the modernisation reform. Indeed, I would like to thank the organisers for the lay-out of this seminar which will, I hope, allow us to dwell on some of the finer points.

This is most timely and appropriate. As you know, Council Regulation 1/2003 was adopted in December last. This means that the main features of the new enforcement system are determined. The preparation for its implementation has moved to a stage where we work out more detailed parts of the picture with a finer brush.

The Commission is soon going to adopt – in draft form for public consultation from September – six new Commission notices on specific topics and the new Commission implementing regulation on certain details of the Commission's procedures.

During the major part of my presentation I would like to take you through this "Modernisation package" as we call it – the name is not misplaced, believe me. And if that leaves us a moment, I will end with a short insight into such practical matters as the building up of the European Competition Network as well as the re-organisation of the Commission's Competition DG and how that links in with the overall picture of the Modernisation reform.

PART I: OVERVIEW OF THE NEW ENFORCEMENT SYSTEM

In order to warm you to the subject however, let me start by some large strokes to briefly recall the basic features of the new Regulation 1/2003 :

- First point: The notification system goes. Articles 81 and 82 become directly applicable in their entirety, that is including Article 81(3). Articles 81(1) and 82 have been directly applicable ever since the Court of Justice found them to be so. Not however Article 81(3), the provision that sets out the conditions that a restrictive agreement must fulfil in order to be legal under Community competition law. From 1st May 2004, no more discrimination between the different parts of Article 81 in this respect. The abolition of the notification system means that the Commission can re-focus its enforcement work – not in order to do less but in order to do more meaningful work in the interest of consumers.
- Second point: Direct application of Article 81(3) means more potential for decentralised application of the EC competition rules by Member States' courts

and competition authorities. Proceedings by national competition authorities and national courts can no longer be blocked or delayed by notifications to the Commission. In the new system, the defence of Article 81(3) can be invoked in all proceedings where it is legally plausible, national competition authorities and courts will have the power and the obligation to apply the provision, subject of course to its conditions of application being fulfilled. In other words: Article 81 will be applied in the same way as thousands of other provisions on the law books.

- Third point: For the first time ever, the competition rules of the EC Treaty will truly become the law of the land. Where a case falls inside the scope of application of Articles 81 and 82, Member States' courts and competition authorities will not be able to leave aside the EC competition rules and base their decisions solely on national law. Under Article 3 of the new Regulation, they have an obligation to apply the EC competition rules, at least alongside national law. Of course they may also apply Articles 81 and 82 on a stand-alone basis.
- Fourth point: Coherent application – the greatest worry expressed during the discussions. The more we progress in the setting-up of the European Competition Network, the more our confidence is increased that Member States' competition authorities are willing and able to speak the common language in such a way that we all understand each other! There will be ample opportunity to practice, in particular in the network, but most importantly, there is great openness, even eagerness to leave the national cocoons and work together to ensure the best possible enforcement of Articles 81 and 82.

PART II - THE MODERNISATION PACKAGE

Let me now leave the big picture and expose those more detailed parts of the canvas to you. As I said earlier, with Regulation 1/2003 in place, one of our main tasks at the Commission is what we call the modernisation package. This package, which will be in place before 1 May 2004, consists of 6 new notices and a new Commission implementing regulation.

These texts are currently heading for adoption by the Commission as drafts for public consultation. The public consultation period will start in September – after the summer-break. Everybody who has an interest in competition law and policy will therefore have plenty of opportunity to scrutinise and comment on all these documents in draft form.

I will spare you the implementing regulation as a separate point – it will be mentioned incidentally – and group the notices in three pairs: There will be two notices on points of substance, two notices on relations with certain stakeholders and finally, two notices on the cooperation with the other enforcers. I will start with substance, take the stakeholders second and end with the other enforcers.

a) The Notice on the concept of effect on trade and the Guidelines on Article 81(3)

A first pair of notices will outline the current state of the case law of the Community Courts and of the practice of the Commission regarding two concepts that are central to the application of the Community competition rules, namely the concept of affectation of trade between Member States and the principles underlying Article 81(3) EC.

(i) Effect on Trade

The *effect on trade concept* is the jurisdictional criterion that determines the scope of application of Articles 81 and 82. This has always been the case, so why now a Commission Notice? The answer lies in the enhanced interest for guidance on this concept as Member States' courts and competition authorities will apply Articles 81 and 82 more often. The question whether a case tests red or blue in terms of effect on trade, decides whether it is inside or outside Articles 81 and 82, inside or outside Regulation 1/2003 and in particular, inside or outside Article 3 of that Regulation.

Against this background, the Commission has accepted to produce a notice on the effect on trade concept. We have however made clear from the very beginning that there can be no question of attempting to modify the scope of application of Community law in one way or another. The forthcoming notice therefore describes and explains the current case law, presenting it in a systematic framework. You should not expect any revolutions here.

What we will do, is to propose a *de minimis* rule concerning specifically the notion of effect on trade. What we have in mind are two cumulative thresholds. One is a 5% market share threshold. The other is a turnover threshold of 40 million Euro calculated on the basis of the products covered by the agreement. For agreements or practices by parties that fall below both thresholds, there would be a rebuttable presumption that trade between Member States is in principle not capable of being appreciably affected.

This *de minimis* rule is specific to the jurisdictional criterion of effect on trade and distinct from the policy orientations in the Commission Notice on agreements of minor importance which do not appreciably restrict competition (the "De minimis notice"). The latter, in line with its full name, only concerns the question of when there is no appreciable restriction of competition.

(ii) Guidelines on Article 81(3)

Second point on substance, there will be a new notice on the application of Article 81(3). Decentralised application of Article 81(3) is one of the main elements of the new system and there is in our view a need for the Commission to explain what is the methodology for applying this exception rule.

For instance, it is very important that we explain what are the types of efficiencies that may be created by restrictive agreements and what are the conditions for finding that consumers receive a fair share of these benefits. The draft notice goes over all the

conditions of application of the provision, explaining the legal notions and providing indications on underlying economic concepts.

The new notice on Article 81(3) does not replace but complement the more detailed Commission guidelines on specific types of agreements and in particular the guidelines on vertical restraints and the guidelines on horizontal cooperation agreements. We are also for instance preparing new guidelines to accompany the new block exemption regulation on technology transfer agreements.

Thus, the forthcoming notice on Article 81(3) will form the general chapter in the guidance “book” that the Commission has been putting together for several years now.

b) Notices on complaints and on informal guidance

A second pair of notices will deal with the relation between the Commission and some of the key stakeholders in competition enforcement, i.e. the consumers and the business community. In that respect, the Commission envisages to adopt a notice on the treatment of complaints in antitrust matters and a notice on guidance to businesses for the assessment of novel questions.

(i) The Notice on complaints

In the new enforcement system market information from businesses and from consumers will become even more important to the Commission. We would like to encourage consumers and businesses to come forward and inform about suspected infringements of the competition rules. However, not everybody has a full-blown *complaint* to make, often market information from several sources has to be collected before it combines to a picture that allows us, for example, to start looking into a case *ex officio*.

We would like to be able to deal efficiently with both situations. Therefore we will create a new electronic address and invite consumers and businesses to provide information on suspected infringements in any form they find appropriate. At the same time, we propose to better frame the Commission’s formal complaints procedure in a way that should improve the quality of complaints from the outset and allow us to focus on the complaints that merit priority treatment.

To achieve this, the new Commission implementing regulation proposes to introduce a requirement for complaints in the strict sense to comply with a “checklist” that sets out certain types of information that should be provided. This obligation to provide a minimum amount of information comes with a bonus attached: The Commission on its part undertakes in the notice on complaints to inform complainants within an indicative time period of four months whether it intends to pursue the complaint in view of a full investigation of the case.

These are the essential novelties in this field. We are not proposing any radical changes to the complaint procedure as such. The existing body of case law has been the guiding star for the explanations in the forthcoming notice.

(ii) The Notice on Guidance Letters

Let me now turn to an issue that has gained some profile in the debate. When the Commission first made the proposal to abolish the notification system some feared that it would lead to a reduction in *legal certainty*. We have taken this concern seriously, which is one of the reasons why it is of paramount importance to us to have the modernisation package ready before the date of application of the new regulation. In the context of the forthcoming notice on the application of Article 81(3) I also mentioned some of the other sources of guidance on the application of the EC competition rules that are available to undertakings.

However, we realise that general guidance may not be capable of solving all problems of unpredictability. What we have in mind is a system whereby the Commission would be entitled but not obliged to issue written guidance in cases that raise unresolved issues concerning the application of Articles 81 and 82. You will understand why it is important that the Commission not be obliged to issue any statements on individual cases upon request. If that were the case it would just be a different name for the current notification system.

That being said, we ourselves do have an interest in providing guidance in certain cases and the new notice will explain what are the factors that will be taken into account. I have already mentioned the most important one, namely the existence of an unresolved issue. We moreover propose to take account of some additional factors. We propose to take account of the economic importance from the point of view of consumers of the products concerned and the importance of the agreement or practice in terms of its prevalence. We also propose to take into account the level of investment made or envisaged by the parties and the extent to which the transaction involves a structural operation.

In my view these factors strike a good balance between the public interest in the Commission using its resources to promote the general good and the private interest of the parties in obtaining guidance in their particular case.

c) Notices on cooperation with NCs and NCAs

A final pair of notices deals with the co-operation mechanisms between the Commission and its present and future partners in the enforcement of the EC competition rules, i.e. the Member States' courts and competition authorities.

(i) The notice on cooperation with national courts

Under Regulation 1/2003, national courts will have an enhanced role. The new draft notice that we will publish for consultation is intended to serve as a practical tool for national judges who apply Articles 81 and 82 in conformity with Regulation 1/2003. With that objective in mind, the draft notice addresses two overall topics:

- First, it gives general explanations about the procedural context in which national judges are operating when applying Articles 81 and 82. There are different layers of law to be taken into account alongside the national procedural law. Certain specific issues are regulated in Regulation 1/2003. In addition, general principles of Community law apply. The Notice assembles relevant case law of the Community courts on this latter point. Particular attention is also given to the situation in which a national court deals with a case in parallel with or subsequent to the Commission.
- Second main topic are the cooperation instruments of Regulation 1/2003. Indeed, Regulation 1/2003 for the first time establishes a legal basis for national judges to ask the Commission for an opinion or for information it holds. In addition, the regulation also created the possibility for the Commission to submit written and oral observations to the national courts in the interest of coherent application. The notice spells out how the Commission intends to put these co-operation mechanisms in practice.

I am aware that in the debate following the Commission's proposal for a new regulation views on the new instrument of *amicus curiae* in particular were very divided. There has been some criticism along the line that the Commission should not tell judges how to decide their cases - while other observers presented the application of Article 81(3) by national judges as a way of throwing companies to the wolves.

With the heat of debate now behind us, I am sure that the practical application of Article 15 of Regulation 1/2003 will be much more of a finer picture once again. As expressly stated in Regulation 1/2003, the aim of the *amicus* instrument is to promote consistent application of Articles 81 and 82. The Commission will only consider using this instrument where there is a real issue of coherent application and its briefs will be strictly limited to the aspects of the case that raise an important issue of consistency. It is of course up to the courts to involve the parties – as appropriate in the respective procedural framework – and to take into account the submission of the Commission in its decision as it sees fit.

The Commission will also not seek any contacts with the parties to a litigation in respect of which it has been asked for an opinion or considers submitting an *amicus* brief. Both types of interaction are a matter between the national court and the Commission. They are intended to allow the Commission – in the public interest – to draw the court's attention to important issues relating to the application of Articles 81 and 82, no more, no less.

(ii) *The Network Notice*

This brings me to the last of our package of notices. The *Network notice* will explain the main pillars of the cooperation between the competition authorities inside the European Competition Network (ECN).

You will probably be particularly interested in the fact that the notice will develop principles for allocating work between the members of the network. In this context, it is useful to recall that these are not rules for the allocation of competence. All members of the network are competent to apply Article 81 and 82 as Regulation 1/2003 creates a system of parallel competences.

Orientations on the division of work between enforcers in the network must be seen against this background. They are indications that will guide both complainants and authorities, ensuring that the vast majority of cases are dealt with by a well-placed authority from the very beginning, while other authorities, equally competent and possibly also well placed, 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”) will be rare. Where it occurs, the authorities involved endeavour to settle the matter as quickly as possible within an indicative time limit of two months.

The orientations in the forthcoming notice 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.

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 or to sanction it adequately. One could for instance see the authorities of the Benelux states cooperating in that way on a case that covers their territories.

Where an infringement has effects in more than 3 Member States, the Commission will often be best placed to deal with a case. Moreover, the Commission will continue to deal with cases independent of their territorial scope where it needs to develop policy or to ensure effective enforcement.

PART III: SETTING-UP THE ECN AND RE-ORGANISING DG COMPETITION

Let me conclude with some remarks about very practical matters of organisation.

a) Setting up the ECN

The European Competition Network is coming off the ground very well. We have created an implementation working group with several subgroups and there is a lot of dynamic and enthusiasm on all sides. Just to give you one example: a sub-network concerning the insurance sector has been started at the suggestion of several Member

States competition authorities. It has held a first meeting and uses the electronic tools to exchange information to enhance knowledge about the market and the respective enforcement activities.

Now, without being a network theorist, let me nonetheless try to give you a general idea of the different forms of cooperation 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 cooperation between the Commission and the Member States competition authorities in the framework of Regulation 17. Regulation 17 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 Member State enforcers to comment – collectively - through the Advisory Committee.

The new Regulation first of all 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 on their draft decisions.

However, the Regulation does not stop there, far from it. It expressly provides for the involvement of the other national competition authorities in the overall context of close cooperation 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 invitations to committee meetings. Close cooperation under Regulation 1/2003 involves all layers of our respective authorities, from bilateral and multilateral cooperation at case-handling level to the quarterly meetings of Directors-general.

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. For confidential information like draft decisions, that will be communicated as from the entry into application of the new Regulation, particular safety measures will be put in place.

b) Reorganisation of DG COMP

How is the Modernisation reform reflected in the decision by the Commission to re-organise its Competition DG ? Two main points can be mentioned here that reflect major objectives of the reform: Effective enforcement and close cooperation in the network.

One of the foremost objectives of the new Regulation is to change the Commission's antitrust enforcement culture from a re-active to a pro-active approach. One of the essential ingredients of pro-active enforcement is market knowledge. It is not enough on its own to find infringements, but it is the indispensable foil that allows you to run

a plausibility check on complaints, on replies from companies as well as on information gathered at inspections.

With this in mind, the re-organisation of our DG includes the integration of merger control and antitrust enforcement in integrated directorates responsible for certain sectors of the economy. This will allow us to pool the market knowledge that flows from both types of enforcement in one and the same structure where cross-fertilisation is simpler than across directorates.

Market knowledge is also the key to close cooperation in the network at all levels. The bulk of cooperation will be about cases and this inevitably requires a high degree of market knowledge. The better our case-handlers will be equipped in this respect, the better DG Competition will be able to communicate policy and build consensus around policy points.

However, integrated directorates are not the end of story. We also see a need for a central point to deal with matters involving the network and the cooperation with national courts. For this purpose, we are in the process of setting up a new “Network unit” at horizontal level. This new unit will serve as a natural contact point and helpdesk towards the outside. Towards the inside, it will exercise a coordinating function.

CONCLUSION

Let me conclude: Implementing the Modernisation reform is certainly a challenge. But it is more correct to say that it is an opportunity, an opportunity to lay the groundwork for more effective enforcement. I am confident that we are making the right use of it. A dynamic has been created that involves the Member States’ competition authorities, the DG Competition services and both cooperating together in the emerging ECN.