

# ARTICLE for magazine "European Lawyers"

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## EU competition policy – the challenges ahead

*The Commission is engaged in ambitious reforms of both its antitrust enforcement and merger control rules. Philip Lowe explains the challenges and the next steps ahead.*

Last year has been a remarkable year for the reform of EU competition policy. In November 2002 the Council adopted Regulation 1/2003, the cornerstone of our new antitrust enforcement system. One month later the Commission launched a wide-ranging reform of the EU merger control system. Now the main challenges are to make both the modernisation of antitrust enforcement and the reform of our merger rules a success.

### 1. Making modernisation of antitrust enforcement a success

Regulation 1/2003 will enter into force on 1 May 2004 and thus on the same day on which the EU will welcome up to 10 new Member States. In order to make the new system operational from the first day DG Competition acts on three fronts in parallel.

First, we are working on a **modernisation package** of flanking general measures. This package consists of a new Commission implementing regulation, which will mainly deal with the modalities for the hearing of the parties, complainants and other third parties and of a number of Commission notices which are designed to provide guidance on key aspects of the new system. Two of those notices will be about central substantive concepts in Article 81 EC, namely the effect on trade between Member States and the principles underlying the application of Article 81(3) EC. A second pair of notices will deal with co-operation within the network composed of the Commission and the competition authorities of the Member States and with co-operation between the Commission and national courts. Finally, two notices are foreseen on the treatment of complaints and on the informal guidance, which the Commission intends to issue in order to assist companies in the assessment of novel or unresolved questions.

Secondly, the parallel competence of several enforcers in the new decentralised system creates a need for co-ordination between them. To this end the **European Competition Network** (ECN) was set up in October 2002. It comprises, on the one hand, the Commission and, on the other, the competition authorities of the Member States and of the 10 Accession States. The ECN meets regularly to prepare the entry into force of Regulation 1/2003 and is making good progress in establishing principles on case-allocation, exchange of information within the network, common investigations and co-ordination of final decisions.

Finally, the new system requires DG Competition to move to an even more **pro-active and investigative enforcement culture**. This fundamental reorientation has

already started some time ago as the record of our anti-cartel activity for recent years shows.

## 2. Adoption of an ambitious reform of merger control

I think it is fair to say that merger control enforcement has been one of the EU's major success stories. It provides a widely respected "one stop shop" for the scrutiny of large cross-border mergers within a tight and predictable timetable. However, in order to ensure that this system will continue to successfully face the challenges of tomorrow (e.g. globalisation, enlargement) the Commission decided to launch a comprehensive review of its merger rules. Seen from this angle the timing of last year's judgments of the CFI was fortuitous as it enabled us to feed some of the conclusions to be drawn from those judgments into the ongoing reform process. The reform package consists of four main elements.

The central element is the proposal for a 'recast' **Merger Regulation**, which we hope the Council will adopt this year or early next year so that it can enter into force in time for the forthcoming enlargement. The main innovations foreseen are:

- a clarification of the substantive test under Article 2 of the Merger Regulation;
- improved rules on the referral of cases from the Commission to Member States and vice versa; and
- the introduction of a degree of flexibility as regards the timeframe of investigations in particular in phase-two cases.

The second major element is a draft Commission Notice with **guidelines on the assessment of dominance in horizontal mergers**. Those guidelines:

- discuss factors which could mitigate an initial finding of likely harm to competition (e.g. buyer power, ease of market entry, 'failing firm defence');
- set out orientation thresholds indicating the levels of post-merger concentration below which the Commission is unlikely to intervene; and
- deal with the treatment of efficiencies in merger analysis by clarifying the extent to which efficiency considerations will be taken into account.

The third element is a draft set of **best practices on the conduct of merger investigations** covering the day-to-day handling of merger cases and the Commission's relationship with the merging parties and interested third parties. Key innovations here are the systematisation of 'state-of-play' meetings between the Commission and the merging parties and 'triangular meetings' in which third parties will have the opportunity to confront the merging parties views.

The final element of the reform is a number of important measures relating to the **internal organisation and staffing of the DG Competition**. They include the setting up of a peer review system in phase-two merger cases: a 'panel' composed of experienced officials will have the task of scrutinising the case team's conclusion with a 'fresh pair of eyes' at key moments of the enquiry. Furthermore a new position of Chief Economist is being created within DG Competition with the staff necessary to provide an independent economic viewpoint to decision-makers at all levels.

I hope it will have become clear that we are putting considerable resources in our two main reform projects. Our ambition both in antitrust and mergers is to establish and operate model systems of modern, efficient and flexible competition law enforcement which are based on close co-operation between the Commission and the Member States and provide transparency and predictability to our stakeholders.