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## The Role of the Commission in the Modernisation of EC Competition Law

**Speech at the UKAEL Conference on**

**Modernisation of EC Competition Law: Uncertainties and Opportunities**

**23 January 2004**

Ladies and Gentlemen,

## I) Introduction

Shortly before Christmas I received the following letter from an Eastern European arms dealer called Yourie Kalashnikov. He wrote: Dear Philip, I have recently signed a joint marketing agreement with my competitors for the sales of light fire arms in the European Union. I would now like to obtain legal certainty that this agreement is compatible with your new law called Regulation 001. My lawyer – God may bless his soul – told me that this is impossible because such a behaviour is not in agreement with your law applying in the entire Union. What is worse, he informed me that not only you might try to come after me, but that the national authorities of the Member States might do the same. I am greatly concerned. Please advise what I shall do. Yours sincerely, Yourie Kalashnikov.

Unfortunately, I never receive such interesting Christmas cards, but let us suppose I did, then the letter would highlight in a nutshell, what modernisation is all about. It is about harmonisation of the substantive European competition rules and its decentralised application. The essential questions are: How will modernisation function in practice. What are the main challenges of the system, now that we are only a few months away from the "entry into force" of Regulation 1/2003.

Today I have been asked to speak to you about "The role of the Commission in the Modernisation of EC Competition Law". I have accepted the invitation with great pleasure. I will address three main issues in my speech:

- In the first part I will briefly recall the main pillars of modernisation, namely the *harmonsation of the substantive law* and *its decentralized application*.
- In the second part I will address the procedural challenges of modernisation, most prominently *case allocation* and *exchange of information* in the network of European competition authorities.
- In the third part I will address the issue how can we ensure a consistent application of European competition law in the enlarged EU.

In all chapters the focus will lie on the role of the Commission.

## II) The main pillars

Let me start with a brief reminder of the main pillars of modernisation. In this respect I am aware that most of you are familiar with the foundations of modernisation. I nonetheless believe that it is useful to take a step back and to briefly describe these foundations. Only a clear view on the underlying objectives explains where the challenges of modernisation will lie.

For me the main pillars of modernisation are two: the harmonisation of the substantive competition rules and the decentralised application of European competition law. In this respect I fully agree with Mr Kalashnikov. What do they mean in practice?

1. The harmonisation of the substantive law

With respect to the first pillar – the harmonisation of the substantive law – I would like to draw your attention in particular to Article 3 of the Regulation. This provision introduces – as

you will be aware - a far reaching harmonisation of the substantive rules governing European competition policy. However the harmonisation is – as you know – not complete. It is necessary to make a distinction between unilateral conduct on the one hand and agreements and concerted practices on the other hand.

Only for agreements and concerted practices the Regulation provides for a full harmonisation. In other words Members States are prevented from applying national rules that would lead to a different result than those obtained by means of applying the European rules. This implies in particular that national law can no longer be stricter than European law. An exception only applies in cases, in which European law is not applicable, namely because no appreciable effect on trade between Member States could be established. However even for these cases Member States will hesitate to introduce stricter national rules as those rules would only apply to small and medium sized undertakings. Thus Article 81 of the Treaty will de facto be the uniform standard for the assessment of agreements and concerted practices in Europe.

For unilateral conduct the degree of harmonisation is less far reaching. However even for unilateral conduct it should be noted that there is some degree of harmonisation. The Regulation introduces a kind of minimum standard. In other words whilst Member States are free to apply stricter rules, the level of protection against anticompetitive unilateral conduct cannot go below the standard set by Article 82 of the Treaty.

For the European business community the harmonisation of European competition law has significant advantages. In particular companies, which are active throughout Europe, benefit from the fact that their contracts no longer need to be assessed on the basis of national laws. It is sufficient that their contracts are compatible with European competition law. It should also play no role, in which country the agreement or practice is assessed, as all authorities and courts apply the same standard.

The harmonisation of European competition law does not however come for free. It needs to be ensured that European competition law is applied in a consistent manner in all Member States, by all authorities and by all courts. This is the first and main challenge of modernisation and it is the Commission's task – even if does not have to do it alone - to ensure that a consistent application of Community law is achieved throughout Europe. I will come back to this issue in the third part of my speech.

2. The decentralised application of European competition law

The second pillar of modernisation is the decentralised application of European competition law by competition authorities and national courts. Here the Regulation introduces a system of parallel competences with respect to competition authorities. In other words a competition case affecting trade between Member States can – as of 1 May 2004 - be dealt with by either the Commission, or a single national authority or various national authorities acting in parallel. This will lead to an increased enforcement of European competition law.

Companies like the one operated by our friend Yourie Kalashnikov might not necessarily like such a system. They might be able to effectively deal with one authority – without going into the details how they achieve their objectives, but with authorities in 25 Member States, the matter gets much more complex.

These companies might also not like an another consequence of decentralisation, namely the discontinuation of the notification system. In this respect it goes without saying that national

authorities and national courts would have been prevented from applying the Community provisions and most prominently Article 81 EC, if the Commission had maintained its monopoly to grant exemptions under Article 81 (3) of the Treaty.

The decentralisation has a number of very important advantages. It will – as I already said - lead to an increased enforcement of European competition law throughout Europe. It will also allow the Commission to concentrate its resources on important cases, as it will no longer be obliged to deal with a high number of less relevant notification cases. It will also lead to a better cooperation and coordination between national authorities and the Commission.

On the other hand it is evident that the introduction of a decentralised application of European competition law will be one of the main challenges of the modernisation exercise. Apart from the already highlighted issue how to ensure a consistent application of European competition law, it raises important questions as to the future cooperation between competition authorities. The same holds true for the relationship between competition authorities and national courts. The underlying issue is how do we ensure an efficient application of European competition law following decentralisation. The concrete questions are: how do we avoid duplication of efforts and how do we ensure that information available in one authority can effectively be transmitted and used by other authorities. I will address these issues in the second part of my speech.

Let me however be clear on one issue. I do not believe that modernisation seriously raises the question of legal certainty as originally claimed by certain members of the business community. It is true that the business community will in future have a higher degree of responsibility when it comes to assessing the compatibility of their action with European competition law. But it should be noted that – whilst the notifications significantly contributed to the workload of the competition authorities – only a very small proportion of contracts was indeed notified to the Commission. The situation has thus not materially changed for most companies. Furthermore Regulation 1/2003 allows the Commission – in exceptional circumstances and by making use of its discretion - to give guidance to the business community on a case by case basis. The only difference is that the business community has no legal rights to ask for guidance from the Commission.

## III) Procedural Challenges to Modernisation

Let me now turn to the second part of my speech, which deals with the question how do we ensure an efficient application of European competition law following decentralisation. Let me begin my presentation by paraphrasing the question: Which measures do we need to take in order to create and maintain an efficient cooperation and coordination between the institutions applying European competition law. In this respect I am of the view that an efficient cooperation of all players concerned will lead to an efficient application of European competition law.

As our time is limited I have decided to concentrate my presentation of today on the cooperation between the European Commission and the national competition authorities. In this respect it is important to note in the first place that Regulation 1/2003 led to the creation of the European Competition Network, in short the "ECN". Members of the ECN are the European Commission and all national authorities that are entitled to apply European competition law. For the UK these authorities will be the OFT as well as certain regulators.

The ECN provides a functioning framework to discuss all issues of mutual concern and to agree on a common approach. It is already a well established tool for the cooperation between the Commission and the national authorities and I believe its effectiveness will even further increase over time. Already today we can observe that for certain sectors specialised subgroups are created in the ECN, in which issues of mutual concern are discussed.

Let me highlight two issues, which seem to be of particular importance when it comes to the cooperation between competition authorities. The first relates to the *allocation of cases* between competition authorities, the second to the *exchange of information* between the authorities.

1. Case allocation

As regards the first issue "case allocation" the ECN has already developed a number of rules and procedures how to allocate cases in the network in an *efficient and flexible* manner. These rules are on the one hand contained in the Joint Statement of the Council and the Commission when Regulation 1/2003 was adopted. On the other hand more detailed guidelines can be found in the draft "Notice on the Cooperation within the Network of Competition Authorities", which we intend to adopt prior to the "entry into force" of Regulation 1/2003.

Both documents are essentially based on the principle of parallel competences. This means that all authorities have the power to deal with a case and decide autonomously whether or not they want to take up a case. The case allocation rules are thus not binding rules on jurisdiction, but principles guiding the network in the assessment which authority is best placed to deal with a case. They provide for a significant degree of flexibility. The main principles are:

- To the extent possible cases should be dealt with by one single authority as this allows for the best allocation of resources in the authorities and limits the administrative burden for the business community.

- The Commission should deal with those cases, which raise concern in more than three Member States or which raise new issues calling for the development of competition policy or in which the Commission has exclusive competence.

- The re-allocation of cases should take place as early as possible, i.e. normally two months after a case has been brought to the attention of the network. Subsequently reallocations should be the exception. The Commission can however decide to take over a case if there is a need to avoid inconsistencies in the application of European competition law or if national proceedings are unduly drawn out.

As you might be aware the Commission carried out a public consultation on the draft Notice at the end of last year. Whilst the Notice in general received favourable reviews, some concerns were raised as to the limited role of the Commission in the case allocation process. In particular it was requested that the Commission needs to ensure that all cases be dealt with by one single authority avoiding parallel proceedings. The main argument was that parallel proceedings lead to additional work for the business community and could increase the risk of double jeopardy. The legal and business community also proposed that the Commission is in charge of all cases affecting more than two - instead of more than three - Member States. Finally the Commission should act as a clearing house when national authorities cannot agree on who should deal with a case.

Whilst the Commission felt quite flattered by these comments calling for a stronger role of the Commission in the network – we should probably send them also to Mr Kalashnikov - , the comments are not compatible with political reality. The Commission cannot and will not act as a clearing house between independent national authorities, but will leave it to the authorities to agree on the appropriate case allocation. The Commission will also not undermine the parallel application of European competition law – the very aim of the modernisation exercise. And it will finally not go against the political compromise reached in the Council as regards the number of countries that need to be concerned before the Commission is considered to be best placed to deal with a case.

In the case allocation process the Commission is thus merely a *primus inter pares*, which has a special role only when it comes to ensuring a consistent application of the law. I will come back to this role in the last part of my presentation.

2. Exchange of Information in the Network

The cooperation between national authorities and the Commission is not only at stake at the initial phase of a case - essentially dealing with the issue of case allocation - , but also during the subsequent phase dealing with fact finding measures. Here the draft "Notice on the Cooperation within the Network of Competition Authorities" sets out detailed rules how competition authorities can exchange information amongst themselves and which guarantees are provided for the business community.

As you will be aware, Regulation 1/2003 foresees two main tools to exchange information, namely the exchange of information pursuant to Articles 11 and pursuant to Article 12. In addition it is possible to exchange information informally between authorities. However in order to assure that information can be used for the subsequent investigation, it appears likely that information exchanges foreseen in Articles 11 and 12 will play a predominant role. The main distinction between the two is that Article 11 creates legal obligations to exchange certain information, whilst Article 12 depends on the voluntary arrangements between authorities.

Information exchanged pursuant to Article 11 (3) mainly pursues the objective to provide network members with an early warning that an authority has initiated an investigation. The scope of the information provided is therefore very limited: it only consists of some basic information on the companies and markets concerned and will be supplied on the basis of a standard form. This information will be fed into a secure computer system accessible for all members of the network.

Information exchanged pursuant to Article 12 will – on the other hand – be much more detailed. It may also contain confidential information raising the question of the protection of the information, in particular of business secretes. Here the draft Notice obliges all network members to respect the rules of professional secrecy. As the Regulation does not oblige the authorities to exchange information pursuant to Article 12, they may also make the transmission of documents dependent on sufficient guarantees being provided by the receiving authority.

These questions are particularly relevant when it comes to the exchange of information gathered in the context of leniency applications. In this respect you will be aware that the Commission as well as certain Member States – such as the UK - have a well established

functioning leniency programme, whilst others are still reflecting about the introduction of such a tool. It goes without saying that those authorities with a leniency programme have a legitimate interest to protect their leniency applicants, whilst all countries – in particular those without a leniency programme – have a strong interest to have easy access to the information provided by leniency applicants, in particular with the view to explore whether parallel investigations are necessary in their own territories.

In the new regime, I believe that we are on a good way forward. We intend to prevent national authorities from making use of general information provided under Article 11 (3) of the Regulation to start an investigation, whilst allowing them to exchange detailed information pursuant to Article 12 of the Regulation, provided adequate guarantees are given for the protection of the leniency applicant. In order to accommodate the concerns of the business community we are also reflecting whether all national competition authorities need to sign a statement by means of which they commit themselves to abide by the principles contained in the draft Notice.

Summarising - and contrary to what Mr Kalashnikov might hope for - I would thus conclude that I am quite confident about the effective enforcement of European competition law following decentralisation. The first steps towards an effective cooperation between the Commission and the national authorities have been taken. Effective case allocation principles and information exchange rules will be in place once the Notice on the Cooperation within the Network of Competition Authorities is adopted. The role of the Commission can in this respect best be described as a primus inter partes.

## III) Consistency

Let me now turn to the third and last part of my presentation dealing with the question how we will ensure the consistent application of European competition law following modernisation. In this respect it should be noted from the outset that the role of the Commission is quite different from the one described above. The Commission needs to guarantee the consistent application of European competition law throughout Europe. This role is not only recognised in the Draft Notice on the Cooperation within the Network of Competition Authorities, but it stems from the Treaty itself and is also fully reflected in Regulation 1/2003.

For the purpose of today's presentation it would definitely go too far to present to you all tools at the disposal of the Commission to ensure consistent application of European competition law. I will therefore not cover our training programme for national judges or the exchange programme for officials working in the competition authorities. I will also leave aside the cooperation with national courts on the basis of the draft Notice on the cooperation with the courts of the EU Member States. I want to concentrate on two main issues: intellectual leadership and the obligation of Member States to inform the Commission about their imminent decisions.

### 1. Cooperation with national competition authorities

Let me start with the second issue, the obligation of Member States to inform the Commission at least 30 days before a decision is taken of the intended course of action. To this end Article 11 (4) of the Regulation provides that national competition authorities shall provide the Commission with a summary of the case as well as with a copy of the envisaged decision.

Whilst for obvious reasons we have not yet gathered any experiences how this provision will be applied in practice, I can assure you that the Commission will take its task to ensure a consistent application of European competition law very seriously. This does of course not mean that we intend to intervene in all cases brought to our attention by national authorities, to the contrary. On the other hand I have created a unit in my Directorate General, which will act as a contact point for all national authorities – also for informal consultations - and which will also be entrusted to with the task to ensure a coherent and consistent application of European competition law by national competition authorities.

As you might be aware Article 11 (4) Regulation does not require national authorities to formally consult the Commission before a decision is taken. The national authority can therefore take the envisaged decision once the 30 days deadline has expired. On the other hand the Commission can make written observations to the decision prior to its adoption. In exceptional cases, most prominently when the consistent application of European competition law is at stake, it can also relieve national competition authorities of their competence to apply Articles 81 and 82 in the case at question. The tool can be found in Article 11 (6) of the Regulation, which allows the Commission to initiate formal proceedings. However before making use of this crude instrument the Commission will discuss the matter with the national competition authority concerned.

2. Intellectual Leadership

A second tool for the Commission to maintain the consistent application of European competition law is intellectual leadership. In this respect the Commission can make use of a number of instruments, such as taking up cases raising new issues or issues of particular interest (Article 10 of the Regulation). Another possibility is the adoption and subsequent publication of a guidance letter, in which important points of law are clarified.

Quite apart from these measures relating to individual cases the Commission can make use of the adoption of general policy documents. These documents can be "block exemptions" such as the technology transfer block exemption currently under discussion or "notices of general interest" such as the notice on the application on Article 81 (3) or the notice on the concept of effect on trade between Member States. These documents set out for the public at large how the Commission sees certain issues and how it will or intends to apply the law in certain cases.

Last but not least it should not be forgotten that the Commission is not alone when it comes to the coherent application of European competition law. In particular the ECN – be it the plenary or in the subgroups - as well as the Advisory Committee will serve as important instruments to discuss policy issues, which will ensure consistency.

**IV) Conclusion**

In conclusion I therefore consider that I will reply to Yourie Kalashnikov that the Commission is well prepared for enlargement and that he should better change his business plan. The co-ordination and co-operation mechanisms which are set in place to channel the joint enforcement of EC competition rules are in my view appropriate to safeguard both the coherent enforcement of the EC competition rules throughout the European Union and the autonomy of the national competition authorities to determine their enforcement priorities. Combined with the right spirit of co-operation, I am confident that we are ready for the modernised antitrust enforcement regime in the enlarged Union of 25.