“Views on how the current modernisation of the competition rules will affect multinational enterprises in Europe”

Key luncheon speech at the Plenary meeting of the EU Committee of the American Chamber of Commerce

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Ladies and Gentlemen,

thank you for inviting me here today to speak about the impact of the modernisation of EC antitrust procedures on multinational businesses. I very much appreciate this opportunity.

As you are aware, the new Regulation 1/2003 implementing Articles 81 and 82 of the EC Treaty was adopted on 16 December last. It is going to replace the venerable Regulation No. 17/62 as from 1 May 2004.

Prior to May 2004, the Commission will produce a set of new Notices to provide additional guidance on a number of issues as well as a new Commission regulation on certain details of our procedures. We have also started to work very intensively with our colleagues from the competition authorities of the present and future Member States to get the European Competition Network (ECN) up and running. The network connects the Commission and the national competition authorities in a new framework.

Businesses are of course also preparing for the application of the new framework. What is important to bear in mind in this context ?

The legal exception system: a new environment for enforcers and companies

The central feature of the new Regulation is the direct application of Article 81(3) of the Treaty. Under this provision, an agreement that restricts competition can nonetheless be found legal if it involves benefits that outweigh the negative impact on competition. Under Regulation 17, undertakings are called upon to notify agreements to the Commission with a view to obtaining an exemption decision. Under the new regulation, agreements that fulfil the conditions of Article 81(3) are legally valid and enforceable without the intervention of an administrative decision. Undertakings will be able to invoke the exception rule of Article 81(3) as a defence in all proceedings.

This means that the new Regulation removes bureaucratic procedures and makes the application of Article 81 EC more straightforward as a legal rule. It also brings the EU enforcement system closer to the US system where there has never been a notification system for agreements.

The primary objective of the new Regulation is to ensure more effective enforcement of the EC competition rules in the future enlarged Community. A high degree of compliance with the EC competition rules is in the interest of consumers but of course also of businesses that want to enter European markets and be active competitors. It benefits all companies active on European markets inasmuch as the market place will be better protected against restrictions of competition. This, in turn, will help produce a "virtuous circle" of more competitive markets and more competitive companies.

Greater responsibility but an adequate level of legal certainty

Direct application of the exception rule confers greater responsibility on businesses.

Under Regulation 17, the assessment that businesses carried out of their agreements could, if a company so chose, focus on the notification process. Under the new system, companies should focus on assessing whether an agreement or practice that they want to engage in complies with the law.

Given the well-known problems of the notification system (longish and cumbersome procedures, comfort letters …), many or even most undertakings and law firms moved to this approach a long time ago. Under the new regulation however, it will be the line to follow for everybody.

The abolition of notifications does not entail a loss in legal certainty for companies. In the new system, the application of Article 81(3) no longer depends on administrative intervention but on the law itself. Legal certainty for companies thus mainly depends on the orientation provided by the framework of legislative and regulatory texts, interpretative notices, case law and practice. This is the reason why the Commission has, alongside the reform of the procedural regulation, overhauled the totality of block exemptions and produced extensive guidelines on vertical and horizontal agreements in recent years. We will further complete this framework, i.a. by Guidelines on the methodology for the application of Article 81(3). This is one of the forthcoming Commission Notices that we are currently preparing.

However, it is not excluded that in a limited number of individual cases novel or unresolved questions for the application of Articles 81 or 82 may present themselves. DG Competition will remain open to discuss such cases with the undertakings where appropriate. We are preparing a further Notice which will set out the circumstances under which guidance in the form of « opinions » could be provided by DG Competition. Such opinions would contain a concise reasoning and be published.

Issuing opinions is not excluded by Regulation 1/2003. It is however clear that the Regulation gives priority to enforcement tasks. The Commission must ensure that this is reflected in its practice. Undertakings can contribute to this by focussing requests for opinions to situations that – on critical scrutiny – appear appropriate. The instrument of opinions should not be mistaken for a substitute of the notifications of the old system.

Towards more decentralised application of the EC competition rules

The second most outstanding feature of the new enforcement system is the fact that the new Regulation opens the way for more decentralised application of Articles 81 and 82.

One of the main concerns expressed during the reform process was the perceived risk that the abolition of the Commission's monopoly over Article 81(3) could lead to a re-nationalisation of Community competition policy. This risk has not materialised. On the contrary, Article 3 of the new Regulation, for the first time in European antitrust history, ensures that all cases that fall within the scope of application of the EC competition rules will be examined under these rules (obligation to apply in Article 3(1)) and that Article 81 is the common standard for the assessment of agreements by all enforcers (convergence rule in Article 3(2)). This is a huge step forward in terms of establishing a level playing field for companies active in the internal market.

The same is true of the creation of the European Competition Network (ECN) as the forum for cooperation between the Commission and national competition authorities. This brings me to one of the "frequently asked questions" with regard to the network: How are the Commission and the Member States' competition authorities going to share the work on cases?

Let me first mention that guidance about the work sharing in the network will be set out in another Notice – the third one I am mentioning today (and that's only half of the package). However, it is not a difficult science at all. There are certain rules of thumb that are based on common sense:

- As a rule, competition authorities of the Member States will be well placed to deal with cases that have major effects on the territory of their Member State, in particular if evidence needs to be obtained from companies on the territory of the same Member State.

- Where a suspected infringement has its main effects in the territory of two or three Member States, these authorities should consider working together on a case.

- For cases with a larger geographic scope and cases that involve other issues of Community law, the Commission is likely to be best placed.

These orientations are without prejudice to the responsibility of the Commission to take up cases that are potential precedents in order to set policy for the internal market, 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.

How is this 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 maximum three months is foreseen. This will permit the network to sort out if 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 remain with the same authority up to the final decision, unless a serious problem arises that would lead to an intervention by the Commission.

Conclusion

To conclude, I believe that business should embrace the new rules that bring about huge progress in several respects. A few years ago already, the OFT – the UK competition authority – forged the motto 'Do not notify, do complain'. In some more words, but in the same order of ideas, I would like to recommend the following:

Do not regret the notification system or even spend time and money on trying to revive it. Make sure that you comply with the law and make sure you complain if you are the victim of illegal behaviour. Thank you for listening to me.