

Facing new challenges for EU Competition Policy

Article for the EUROPEAN ANTITRUST REVIEW 2003

The past 12 months have seen important developments in the European Union with a significant impact on EU Competition Policy. It is now clear that the most ambitious enlargement in the history of the EU will take effect on the 1st of May 2004 with the expansion of the Union to 25 Member States. The European Convention completed its work in Summer 2003 and submitted a Draft Constitutional Treaty to the European Council in view of an Intergovernmental Conference to start in October 2003. The draft Treaty is generally positive as far as competition policy is concerned. I would highlight, in particular, the fact that «*a single market where competition is free and undistorted*» figures amongst the objectives of the EU, that the legislative power to establish the competition rules necessary for the functioning of the internal market shall remain in the EU's exclusive competence and that the substantive rules of the EC Treaty on Antitrust and State aid have been taken over without changes. Further challenges ahead include the fast changing economic environment, the need to bring EU Competition Policy closer to the citizens and the stringent standards of due process set by the European Courts. In order to meet them, the Commission is pursuing a pro-active strategy in which policy and enforcement tools, including DG Competition's internal organisation and working methods, are continually adjusted and improved. Only on this basis will it be possible to continue providing consumer benefits and incentives for undertakings to increase their competitiveness, as well as to maintain the legitimacy of EU Competition Policy among citizens, undertakings and Member States alike.

In the area of **Antitrust**, at the end of 2002 the Council adopted Regulation 1/2003 which lays down a new framework for applying Articles 81 and 82 EC Treaty, with a view to making more widespread and at the same time more effective enforcement possible as of its date of entry into force on 1 May 2004. The new regulation opens a new chapter in the application of the EC competition rules by the Commission, National Competition Authorities and National Courts throughout the EU. This decentralisation is accompanied by the creation of the European Competition Network (ECN) involving the Commission and the National Competition Authorities. The Network will have a key role to play with regard to the work sharing between the public enforcers as well as for promoting coherent application of the EC competition rules.

After consultation of the interested public, the modernisation of the enforcement rules will be completed by a package of seven accompanying documents to be adopted by the Commission before 1 May 2004. The first block of this «modernisation package» will be a Commission Regulation for the implementation of Council Regulation 1/2003. It will contain detailed rules about the Commission's Antitrust procedures, including for instance the complaints procedure, the hearing of the parties, the settlement of disagreements about the confidential nature of information provided by undertakings as well as other procedural issues. The second block of the

«modernisation package» will consist of six notices addressing some of the key features of the new enforcement system. A first pair of notices will outline the current state of the European Courts' case law and of the Commission's practice regarding two important aspects of EC competition law, namely the effect on trade concept and the principles underlying Article 81(3). A second pair of notices will deal with the cooperation mechanisms between the various enforcers of the EC competition rules, i.e. the Commission, the National Competition Authorities and the National Courts. These documents are mainly designed to elaborate on the cooperation mechanisms provided for by Regulation 1/2003 to ensure an efficient and coherent application of Articles 81 and 82. A final 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.

Decentralising the application of the Antitrust rules and abolishing the notification system will enable the Commission to focus on its core task, i.e. detecting and punishing the most serious infringements of competition law. Already in the final phase of the outgoing enforcement system we managed to step up the prosecution of cartels significantly. In a "modernised world", the Commission will have even more scope to investigate cartels and also to enhance its action against abuses of dominant positions. Apart from the new 2002 leniency programme, which has already yielded substantial results in the cartel sector, the Commission will benefit from the more effective investigative powers foreseen in the new Regulation 1/2003.

In the area of **Merger control**, the challenge is to ensure the continuing effectiveness of our system in the face of increasingly complex cases and closer scrutiny by the European Courts. With that purpose in mind, the Commission launched in 2000 a comprehensive review of our Merger control system, culminating in the presentation of a reform package in December 2002. Lessons drawn from the three judgments of the year 2002, by which the Court of First Instance annulled prohibition decisions by the Commission, have also contributed to the content of the reform package.

The centrepiece of the reform is the Commission's proposal for a new Merger Regulation, which we hope the Council will adopt before the end of 2003 or in early 2004, so that it can enter into force upon enlargement of the EU on 1 May 2004. Negotiations in Council are on-going with a view to reaching agreement by the end of 2003 in due time for the revised Merger Regulation to enter into force on 1st May of that year. As regards the substantive criteria for merger analysis, the Commission carried out a thorough comparative analysis of the respective merits of its current dominance test with other standards and notably with the "substantial lessening of competition" (SLC) test used in several other jurisdictions such as the USA, the UK and Ireland. The Commission has concluded that the dominance and SLC standards have produced closely convergent outcomes, especially in the EU and US in recent years and that the dominance test, if properly interpreted, is capable of dealing with the full range of anti-competitive scenarios which mergers may engender. However, we have at the same time acknowledged that there is a degree of uncertainty in the minds of at least some commentators as to the precise scope of the current test. In particular, some take the view that there may be a "gap" in the coverage of the dominance test, notably regarding some situations of oligopoly. Consequently, the

Commission is proposing to clarify the scope of the current test so as to remove any such uncertainty once and for all. This would ensure a maximum of legal certainty and in particular make it clear that the test also applies where a merger results in "unilateral effects" in situations of non-collusive oligopoly.

Comprehensive guidance as to the Commission's approach to the analysis of mergers will be provided by the forthcoming Notice on the appraisal of horizontal mergers. It will *inter alia* address the issue of efficiency claims made by the merging parties, making it clear that efficiencies can only be taken into account if they are substantial, verifiable, directly linked to the transaction and of direct benefit to consumers. At a later stage, we intend to adopt further guidance on the Commission's approach to the assessment of vertical and conglomerate mergers.

In terms of procedure, the proposed new Regulation foresees an overhaul of the investigation tools and procedural safeguards in close alignment with Regulation 1/2003 on the Antitrust procedure. This will be complemented by a set of best practices on the conduct of merger investigations, covering the day-to-day handling of merger cases by DG Competition, the Commission's relationship with the merging parties and interested third parties, and in particular concerning the timing of meetings, transparency and due process in merger proceedings. With regard to the jurisdictional scope of the Merger Regulation, the Commission proposes to simplify and render more flexible the provisions concerning referral of cases from the Commission to Member States and *vice versa*, including the possibility of referrals being made prior to notification. The objective is to optimise the allocation of merger cases between the Commission and National Competition Authorities in the light of the principle of subsidiarity, and with a view to reducing the number of so-called "multiple filings" as much as possible.

Finally, on the level of internal organisation, the Commission has decided to bring Merger control and Antitrust enforcement within DG Competition together in integrated directorates responsible for certain sectors of the economy. The idea behind this change is that market knowledge is an essential ingredient of a pro-active competition policy and that a common organisational structure will better allow us to pool the market knowledge that flows from both types of enforcement.

In the area of **State aid control**, the Commission continues its efforts towards greater transparency by publishing and updating the State aid register and scoreboard. The April 2003 update of the State aid scoreboard shows that overall, Member States are on the right track in terms of reducing aid levels and redirecting aid to horizontal objectives of common interest such as small and medium-sized enterprises, the environment, and research and development. However, while total State aid in the 15 Member States fell from 102 billion Euro in 1997 to 86 billion Euro in the year 2001, the considerable distortive effect on competition in the Internal Market, which this amount of State aid inevitably still has, cannot be denied. This, and the imminent enlargement of the EU, forces us to strive for more effectiveness in our State aid control procedures and working methods. We have therefore made some organisational changes and launched a process of simplifying and clarifying the applicable State aid rules. An important element, which did not function perfectly so far, is monitoring and enforcing compliance with the Commission's State aid

decisions. A newly created unit in DG Competition is now charged with this task and will in particular take care of effective recovery of illegally granted aid.

With regard to State aid procedures, the Commission's objective is to eliminate unnecessary formalities whenever possible. In the case of aid for SMEs, for training and more recently for employment, the old frameworks have been replaced by block exemption regulations, which relieve Member States from the need of notification of individual aid or aid schemes. And soon there will be another block exemption regulation with regard to research and development aid for SMEs. In addition to this, we have started a wider dialogue with Member States about simplifying procedures even further. First results include the recently adopted and published new State aid complaint form which should be used for all future complaints about State aid. A more general issue put forward by Member States concerns avoiding onerous notification and assessment procedures for State aid measures which have only a minor economic importance and which do not raise significant competition concerns at the European level. Although we already have a *de minimis* rule, we would like to try to go further. DG Competition has therefore started an intensive internal reflection on how best to distinguish between cases of lesser and higher importance.

A **general trend** in all areas of EU competition policy is that the Commission has to deal with cases and projects which are increasingly complex in terms of the necessary economic and legal analysis, and which are subject to closer scrutiny by the European Courts. Therefore, apart from the already mentioned specific changes in its organisation and working methods, DG Competition created an internal system of peer review which can be used in particularly complex Merger, Antitrust and State aid cases. A panel composed of experienced officials scrutinises a case team's conclusions with a "fresh pair of eyes" at key points of the investigation. This will result in a second opinion as to the strengths and weaknesses of a case, independent from the position of the case team, which should increase the legal and economic solidity of the final decision. In addition to that, the Commission has created a new position of Chief Competition Economist. Professor Lars-Hendrik Röller was appointed to the post in July 2003. In Merger control, Antitrust and State aid cases, the Chief Economist will offer an independent economic viewpoint for policy development and provide guidance in individual cases throughout the investigation process. In cases requiring sophisticated quantitative analysis, a member of his staff of economists may be seconded to work in the case team.

Finally, globalisation has made it essential for the EU to engage in **International cooperation** about competition matters at both bilateral and multilateral levels. In the past 12 months, we have made considerable progress in various *fora*. With regard to bilateral cooperation, the two most significant advances were the signature of the Cooperation Agreement with Japan, which entered into force in August 2003, and the development of best practice guidelines concerning EU-US cooperation in merger cases which were issued in October 2002.

At a multilateral level, the International Competition Network (ICN), which was launched in October 2001 by Competition Authorities as an informal forum to foster the policy dialogue and to identify best practices, is developing even better than our own, already optimistic expectations. The Second Annual Conference in Mérida in June 2003 brought together most of the 80 Competition Authorities that have already

joined the ICN, as well as representatives of the business community, the legal profession, consumer groups and the academic world. It confirmed the high priority that every Competition Authority must give to competition advocacy in order to increase public awareness of the benefits of competition and actively influence other policies from a competition perspective. The conference also discussed how global governance mechanisms in the review of international mergers can be improved further. In this context, it endorsed a package of seven “recommended practices” for the review of multi-jurisdictional mergers, aiming to identify the steps which Competition Authorities may usefully take in order to facilitate cooperation and convergence. This should help to make our review processes more efficient, and thereby reduce the costs and burdens associated with international merger review. Lastly, the conference also discussed how credible and sustainable competition regimes can be established in developing and transition economies. In this regard, the European Commission presented a special report together with its South African colleagues about various ways in which the capacity building process in these countries can usefully be supported. The report concludes with an inventory of all those issues that donors of assistance should consider when designing projects of external support.

At the end of this *tour d’horizon*, I hope to have illustrated the evolving challenges faced by EU competition policy. The Commission, Commissioner Monti and DG Competition, which I have the honour to lead, are working hard to make it a success. In this endeavour, cooperation and exchange of views with Member States and citizens as well as the business and legal community are of critical importance. Publications like the European Antitrust Review are important elements in this process.