

Decentralised enforcement of Community Competition Law

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Background

1. The background to the Commission's consultation document "White paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty"¹ is as follows.

Decentralisation is now possible²:

- a majority of Member States now have effective antitrust authorities, national laws based on EC antitrust rules, and eight have express power to apply Community competition rules. These authorities at least are in a position to carry out the original intention in the EC Treaty that Community competition law would be enforced partly by national authorities;
- a large body of caselaw, of the Community courts and the Commission, now exists;
- new group exemptions and new guidelines are planned on both vertical and horizontal agreements;

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All opinions expressed are purely personal.

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¹ O.J. No C 132/1, May 12, 1999.

² See generally Schaub, EC competition system – proposals for reform, in Hawk (ed.), 1998 Fordham Corporate Law Institute (1999); Temple Lang, General Report on national application of European Competition Law, in XVIII Congress of the Fédération Internationale pour le Droit Européen (Stockholm 1998), Vol. II and Vol. IV; Braakman (ed.), The application of Articles 85 and 86 of the EC Treaty by National Courts in the Member States (European Commission, 1997); Temple Lang, European Community Constitutional Law and the enforcement of Community antitrust law, in Hawk (ed.), 1993 Fordham Corporate Law Institute (1994, New York), 525-604 and 1994 Fordham Corporate Law Institute (1995), p. 595; Temple Lang, EEC competition actions in Member States' Courts – claims for damages, declarations and injunctions for breach of Community antitrust law, in Hawk (ed.), 1983 Fordham Corporate Law Institute (1984, New York), 219-304; Behrens (ed.), EEC competition rules in national courts (Nomos, Baden-Baden, 1994); Lässig, Dezentrale Anwendung des Europäischen Kartellrechts (1997); Temple Lang, The core of the constitutional law of the Community – Article 5 EC, in Gormley (ed.), Current and future perspectives in EC competition law (1997), 41-72; Jones, Private Enforcement of Antitrust Law in the EU, UK and USA (Oxford U.P., 1999).

- the duties of cooperation of national authorities and courts under Article 10 EC (ex-5) are more clearly understood; e.g. *Iberian U.K. v. BPB Industries*, 1996 2 CMLR 601; *Hasselblad v. Orbison*, 1984 3 CMLR 679.

Decentralisation is desirable:

- approximately 60% of all cases are brought before DG IV by notification, but the most serious infringements, and practices of dominant companies, are rarely notified;
- for linguistic reasons, and to avoid multiple procedures;

Decentralisation is needed:

- the number of cases brought before the Commission and the elaborate procedures imposed by Regulation 17 make it impossible for the Commission to deal with them all by formal decision, and impossible for it to find enough time to detect and prohibit serious secret cartels;
- enlargement of the Community by an additional five, ten or more new States is likely to occur in the next few years.

More generally, we have to take into account monetary union, globalisation, the European single market, and the politico-legal principle of subsidiarity.

Aims

2. These objectives are appropriate:

- to eliminate all unnecessary notifications, to the Commission and to national authorities;
- to facilitate handling of cases at national level wherever practical, including applying Article 81(3);
- to coordinate the actions of national authorities and minimise differences between national and Community antitrust laws;
- to enable the law to be enforced more effectively against the most serious practices;
- to simplify as far as possible the procedures imposed by Regulation 17;
- to ensure that national courts efficiently and fully protect rights given by Community antitrust law and to try to ensure that the conclusions arrived at are the same everywhere;
- to avoid forum shopping;
- this will necessitate arrangements for allocating cases between the Commission and national authorities, to ensure that the same results will be reached whoever deals with a case, and to avoid multiple procedures. These will have to be flexible and informal, as long as there are substantial differences between the effectiveness of the different authorities. Tests like the “centre of gravity” of a case are not easy to apply quickly and clearly;

- personally I think that, in the longer term, harmonisation of national authorities' procedures and powers (definition of confidentiality, complainants' rights, access to files, rights of defence, lawyer client privilege, etc.), of civil remedies in national courts for breach of Community antitrust law, and of the size of fines imposed for breach of Community antitrust law, would be desirable.

Basic changes

3. All this involves changing Regulation 17 fundamentally:

- more group exemptions and more guidelines from the Commission to align the actions of national authorities applying Community law, and national law based on Community law. (The decentralisation proposals should be seen as linked to the Commission's changes in substantive rules on vertical and horizontal agreements);
- giving national authorities power to withdraw the benefit of group exemptions;
- the Commission's proposal is to reduce the number of notifications by treating Article 81(3) as applicable without any administrative decision (i.e. *exception légale*, reversing the choice made in 1961). This would have the effect of eliminating notification of certain categories of agreements (so that administrative approval of individual agreements would not be necessary; Article 81(3) could be applied by national courts without previous administrative decisions). So Article 81(3) would be treated primarily as a legal issue, not one of policy (except for group exemptions).
So the most important proposals is to empower all national authorities to apply Article 81(3);
- exclusive Commission jurisdiction in cases still individually notified to the Commission;
- strengthening the investigatory powers of the Commission.

Strengthening national competition authorities

4. At national level, some strengthening of national authorities and courts is needed (legislation is needed either at Community level or at national level or both, to make some of these changes). Adoption of the Commission's proposals will put pressure on national governments to make improvements in these respects:

- all national authorities should have express power to apply Community law;
- with enough staff to handle their workload efficiently;
- with procedures enabling them to decide cases in a reasonable time;
- with sufficient independence, professionalism and objectivity (compare the requirements for regulatory authorities under telecommunications directives);

- with procedures enabling them to enforce the law effectively (including interim measures); (but this does not necessarily mean that the competition authority itself needs to take decisions, provided that court procedures are quick enough);
- effective and timely judicial review of all decisions of national authorities at the request of all interested parties (this means that the court with jurisdiction must allow review sufficient to allow all relevant points of EC law to be raised so that EC law issues can be referred to Luxembourg under Article 234 (ex-177): the European Convention on Human Rights also requires full review on appeal, but is not directly applicable). The rights of complainants to appeal against regulations will probably need to be harmonised;
- safeguards to ensure that no national competition or regulatory authority approves any price or practice which is contrary to Community antitrust law (Ahmed Saeed, 1989 ECR 803, Asjes 1986 ECR 1425). (They would have power to apply Article 81(3)). This means a minimum application of Community rules;
- to end all obstacles to enforcement by national authorities (e.g. exemption of some sectors from their jurisdiction) and allowing them to use evidence obtained by the Commission (reversing the Spanish Banks judgment);
- improved arrangements for closer cooperation between national authorities and the Commission, and for making decisions of national authorities available in other languages (e.g. on websites);
- enabling national authorities to give confidential information to the Commission and to one another, and to pass cases to one another;
- clearer recognition that national courts must fully protect rights given by Community antitrust law (declaratory actions, class actions, fewer delays, interlocutory injunctions, remedies against unlawfully obtained advantages).
- perhaps, national rules giving the Commission a right to appeal in national courts against decisions of the national competition authority or judgments of lower courts;
- clarification and probably harmonisation of the rights of complainants before national competition authorities, and of the extent of the duty of authorities to apply Community competition law.
- specialised commercial/competition courts? Economists as advisers to national courts? A standing national amicus curiae on EC law issues, or on economic issues?

Changes in Regulation 17

5. These are the basic legislative changes proposed in the White Paper on procedural issues:
 - national authorities will have power to apply Article 81(3), and national courts will be able to apply it without any previous administrative action;

- except for mergers and joint ventures coming under the Merger Regulation (perhaps extended to cover some additional joint ventures), notifications to the Commission will no longer be made, and the Commission will no longer be obliged to give individual exemptions under Article 81(3);
- national competition authorities will have power to withdraw the benefit of group exemptions, but will not otherwise be free to prohibit agreements subject to a group exemption;
- the Commission will have a (new) power to adopt favourable decisions taking note of commitments given by the parties, making them binding on the parties and enforceable by third parties;
- national authorities will be free to use evidence obtained by the Commission, and to give confidential evidence they have obtained to other national authorities so that they can apply EC law;
- national authorities and courts will inform the Commission when they plan to apply EC law, to help ensure consistent application;
- Commission inspections could be authorised by the Court of Justice or the Court of First Instance. The Commission will be empowered to question individuals. Fines for misleading and incomplete information will be increased;
- Interim measures procedures will be clarified and made quicker and more efficient, and used more frequently.

Arrangements for cooperation and consistent application

6. Application of Article 81(3) by national authorities will necessitate:

- an effective (probably pragmatic, informal) system for allocating cases between national authorities. Complainants will not need to choose the “right” authority if cases can be transferred easily;
- arrangements for resolving differences of opinion between national authorities arising during consultation over individual cases (one possibility is that the Commission could take over the case);
- perhaps, giving other national authorities, and companies not parties to the agreement in question, the right to get judicial review in national courts of the decisions of each national authority.

Where there will have to be some criteria, it does not seem wise to have legally binding rules on allocation of cases because:

- different solutions may be needed in different Member States, depending on the size, workload and efficiency of the national competition authority;
- litigation over the correct allocation of cases would cause expense and delay;
- an adequate set of rules would be complex;
- cases must be allocated on the basis of the facts as they appear initially;
- cases under Article 86 (now 82) may turn out to be about Article 90 (now 86).

Concerns

7. Concerns have been expressed about:

- the ability of national courts to apply Article 81(3). In fact, Article 86 now 82) cases, which courts already deal with, are more difficult than Article 81(3) cases. Insofar as these concerns are justified in any given Member State, there are a variety of measures which could be taken. These include arranging for national competition authorities to consider and investigate genuinely difficult cases before the courts deal with the (and for courts to adjourn to allow this): submissions by competition authorities to courts: appointing economic advisers to sit with judges: a standing national *amicus curiae* on EC competition issues, or on economic issues, or on all EC law issues: a specialised competition law court: some economic training for judges.

The idea of a Community Law Adviser or “National Advocate General” in each Member State, advising if a national court requested advice, has advantages: for all EC law issues, not only competition law: could advise on economic issues as well as law: could advise on the application of law to facts: would reduce the number of references to the Court of Justice under Article 177 (now 234): could improve the drafting of Article 177 questions: would improve and speed up the application of EC law by national courts;

It is for each Member State to see which, if any, of these possibilities is necessary and appropriate. One should recognise that there are some cases which should not be dealt with by a national court or even a national competition authority if the evidence is not in the jurisdiction;

- uniform application of EC law: there will be some discussion or coordination of national authorities’ decisions. In practice, differences are more likely over the application of the law to the facts than over purely legal issues. The Commission will have power to take over a case if necessary: national authorities will be subject to judicial review and references to Luxembourg: until now differences in national competition laws have not caused serious complaints. National authorities will be able to intervene in national courts, and to consult the Commission, and have a duty to avoid conflicts. If unclear divergences arise, the Commission and national authorities can consult on how to end them; Commission guidelines or Notices could be used;
- legal certainty: the right to notify and the (theoretical) right to receive a formal decision from the Commission would disappear. However, some lawyers now advise that notification is not worthwhile. The legal effects of administrative letters are less than that of formal decisions. There is now a lot of caselaw of the Courts in Luxembourg, and many exemption decisions from the Commission. More group exemptions

and notices are planned. The Commission will plan to adopt guidelines and decisions as precedents on new problems. Companies with small market shares will anyway be under group exemptions. National procedures will no longer be interfered with by inability to apply Article 81(3). Companies with large market shares can afford to pay lawyers and to rely on their advice (and their joint ventures will come under the 1998 amendment to the Merger Regulation). In many other areas of law, companies rely on their lawyers and have no right to obtain an official authorisation. Although Article 82 is much harder to advise on than Article 81, companies hardly ever notify under Article 82. An equivalent of US business review letters is being considered, written at the Commission's discretion and before agreements are signed, e.g. in cases involving very large capital expenditure financed by consortia of banks. There has been no objection raised when national laws do not provide for notification (the UK authorities allow, but discourage, notifications).

Benefits

8. All this should lead to:

- reduced costs to industry (no unnecessary notifications, no multiple procedures, no unnecessary differences between national laws, one compliance programme for the whole Community);
- more responsibility for lawyers (they will have to advise their clients whether their plans are lawful, not merely advise that they should be notified). More reliance will be placed on compliance programmes;
- companies may wish to notify under national law agreements which can no longer be notified under Community law;
- greater need to clarify lawyers' rules of ethics (duty not to mislead Community and national authorities and courts, duty not to help clients to break the law). This will need an effective response from European lawyers' organisations, not given until now.
- regarding national competition authorities as a network or a coordinated team;
- EC law will be able to replace national competition laws as far as national authorities want, apart from the need for an effect on interstate trade.

Future role of the Commission

9. These proposals would have the effect of putting national competition authorities in many respects on a basis of equality with the Commission (except, of course, that they would have jurisdiction only in their own Member State). However, the Commission would:

- continue to be responsible for policy for the Community as a whole, and investigations in several Member States, and for large mergers and joint ventures;

- resolve differences of opinion between national authorities;
- the Commission will also deal with international cooperation concerning antitrust cases:
 - if asked to, under positive comity rules
 - in WTO
 - in OECD
- under bilateral agreements with non-Member States (USA, Canada) on cooperation in competition matters.

Implications for national laws

10. The Commission has not tried to assess the implications of these reforms for national competition laws. They are matters for national parliaments and governments. Some national authorities question the value of notification regimes except with very new competition laws.

However, it seems to me that in the long term these proposals, if adopted, would lead to demands for harmonisation of:

- the right of complainants;
- procedures and penalties of national competition authorities;
- the civil consequences of violating Community competition law (damages, injunctions, declarations);
- further alignment of national competition laws (due to *inter alia* the judgments of *Leur-Bloom* (1997 ECR I 4161) and *Bonner* (1998 ECR I – November 26, 1998). Already, national competition authorities may not authorise any practice which is contrary to Community competition law (*Ahmed Saeed*, 1989, ECR 803) and probably cannot prohibit a practice exempted by the Commission (*Advocate General Tesaro in BMW* (1995 ECR I 3439) and *Volkswagen* (1995 ECR I 3477)).