

FREIBURG CONFERENCE

Reform of European competition law

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Session I: Efficient protection of competition in an enlarged Community through full association of national competition authorities and national courts

1. The shift from a notification system to a directly applicable system

- The principal aim of the Commission's proposal for a new Regulation implementing Articles 81 and 82 is to strengthen enforcement and enhance the protection of competition throughout the Community.
- The present notification system does not contribute positively to the protection of competition. In this system, where agreements are notified in order to benefit from the exception rule of Article 81(3), companies assess the likelihood of exemption before deciding whether to notify. If exemption is not likely, the agreement is not notified. This means that serious infringements are never notified. The present system keeps the Commission busy with largely unproblematic cases.
- The elimination of the notification system will allow both the Commission and the national competition authorities to concentrate on the most serious infringements. There will be more enforcers of EC competition law focusing on the right cases. This will enhance the deterrent effect of the rules. Real deterrence stems from prosecuting infringement, not from processing notifications.
- The proposed new system will also allow the national courts to apply Article 81 as a whole and therefore allow them to play a grater role in the application of Community competition law.
- The roles of the competition authorities and the courts will be complementary. The courts will in particular deal with claims for damages and contractual disputes.
- Courts will not replace the competition authorities in the enforcement field. Complainants will remain entitled to file their complaints with the authorities. In fact, one of the aims of the reform is to allocate more resources to dealing with complaints. The position of complainants is strengthened, not weakened.

2. The prohibition rule in the new system

- The proposed new system remains firmly based on the prohibition rule of Article 81(1). Agreements that restrict competition and do not fulfil the four conditions of

Article 81(3) are prohibited *ab initio*. Under the Commission's proposal the party invoking the benefit of Article 81(3) bears the burden of proving that all the conditions for the application of the exception are satisfied.

- Hardcore cartels will never satisfy the four conditions of Article 81(3). Price fixing or market sharing agreements create profits for the parties but no objective benefits in the sense of Article 81(3). Moreover, it is clear that hardcore cartels do not create any benefits for consumers as is required under Article 81(3). Hardcore cartels are and remain prohibited *per se*.
- The reform merely avoids the situation where agreements caught by Article 81(1) must be prohibited by national courts simply because they have not been notified, even if the benefits produced by the agreement clearly outweigh the negative effects. The proposal eliminates the bureaucratic burden of notification, which fall heavily on companies not least SMEs.
- The adoption of a more economic approach to agreements and practices that may be restrictive by *effect* helps us to focus the prohibition rule on the cases that are likely to have an impact on the market. The market power criterion reflects the requirement under Article 81(1) that agreements, which are not restrictive by object, must have at least potentially appreciable restrictive effects on the market. It provides a useful framework for distinguishing those cases that are bad for competition and consumers from those that are not. This strengthens the effective protection of competition.
- Agreements that are restrictive by their very *object* are prohibited without any examination of the effects being required. This is and remains settled case law. This category, of course, covers hardcore cartels.
- Other types of horizontal agreements such as R&D agreements or specialisation agreements are not and have never under Community law been considered restrictive by object. They are not automatically caught by the prohibition rule of Article 81(1). They must be assessed on a case by case basis to determine their possible negative and positive effects.
- Cooperation agreements can increase the competitiveness of companies and enhance competition. Competition law should not discourage such transactions. Of course, cooperation agreements may also restrict competition in the market to the detriment of consumers, in which case they should be prohibited and brought to an end. Article 81 provides a structured and balanced framework for making this assessment.

3. The Commission's powers of investigation

- Efficient enforcement at the level of the Commission requires that its enforcement powers be brought up to date.
- At present, our inspection powers can be easily undermined by storing incriminating documents in private homes. This is confirmed in several recent cases.

- The Commission urgently needs to obtain the power to inspect private homes. The national competition authorities in several Member States have similar powers and the experience is very positive. The exercise of this power will of course be subject to authorisation by the courts.

4. The network and effective enforcement

- The Commission's proposal for a new implementing Regulation is based on the firm belief that close cooperation between all competition authorities in the Community will greatly strengthen enforcement. Cooperation avoids duplication of work and will allow the national competition authorities to deal effectively with more cases.
- The aim of the proposal is not to establish a system in which the Commission offloads small routine cases on the national competition authorities or turn them into national extensions of the Commission. All competition authorities should in our view focus on prosecuting the serious infringements. No one should deal with the current load of routine cases brought about by the notification systems. Only then can we achieve the main aim of the reform, namely to strengthen the protection of competition.
- The proposal does contain a consultation mechanism and maintains the power of the Commission to withdraw a case from a national competition authority by opening a procedure with a view to adopting a decision. However, these mechanisms do not aim to centralise decision-making. Far from it. The aim is to ensure the necessary degree of coherence in the internal market.

5. Article 3 and the challenges of the future

- In its proposal the Commission proposes that all competition authorities apply Community law rather than national competition law in respect of agreements and practices that affect trade between Member States. The aims of the proposal are to strengthen enforcement and to create a level playing field throughout the Community.
- More decision-makers applying the same rules will strengthen enforcement and enhance the protection of competition throughout the Community. The common rules will be applied in close cooperation, allowing the authorities to act more efficiently. Multiple proceedings will be avoided and the cases will be dealt with at the appropriate level and by the best-placed authority. Moreover, when the authorities apply the same rules within the framework of a network they will individually be less vulnerable to political pressures, leading to a better protection of competition.
- When all authorities apply the same law it will be possible to develop a truly common competition policy drawing on the experiences of each authority. This is essential from the point of view of the internal market. In an integrated market it is inefficient to have multiple barriers. Multiple barriers create distortions of competition and increase companies' costs. Each time companies engage in intra-

Community trade they must examine the position not only under Community law but also under each of the laws of the Member States affected by the agreement. And worse: they will have to comply with the strictest national law, which can reduce the benefits created by the agreement in other Member States. In the case of agreements affecting cross-border trade, the interest of the Community and other Member States will necessarily be affected. A common market therefore requires a common competition policy that takes due account of the Community interest.

- It is also important to take account of the fact that the world around us is changing and has changed fundamentally since 1962. Markets are globalising and we are increasingly seeing that competition is between economic blocks: the European Union, the US and Japan. In this new world we must join forces and not continue to do what we have done in the past, namely to apply separate rules to our separate turfs. That will only weaken our position. We must free ourselves of the past in order to meet the challenges of the future.