

**Hellenic Competition Commission**

**Conference**

**on**

**« Developments of competition law and policy –  
European and National perspective »**

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*Speech on*

*« Developments of European Competition Law »*

by

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Ladies and Gentlemen,

let me first of all express my sincere thanks to Dimitris Tsouganatos, the President of the Hellenic Competition Commission, for his brilliant idea of combining the meeting of the Heads of European competition authorities with a conference that is open to a highly qualified public interested in competition matters. By reaching out to the academic and business communities, this conference sets an imaginative precedent for the network of competition authorities.

### *The challenges*

We are dealing today with a policy which is in a dynamic process of renewal and modernisation. During the last years, the Commission has scrutinised the enforcement methods used to implement competition policy in the Union. It has launched a series of important reform initiatives. These initiatives are not “*l’art pour l’art*” but reflect important developments that compel us to adapt our working methods:

- First, competition is going global. European competition policy is the platform that enables the European Union to promote competition law and enforcement in a range of international contexts. In order to be successful in these efforts we must live up to the high expectations of our international partners.
- Second, the Union is preparing for the most important enlargement in its history. We must create workable solutions for a Union of 25 or 28 Member States.
- Finally, with the Euro in the pockets of the European citizens, a properly-functioning framework for the protection of competition in the internal market is as vital as ever as the basis of consumer benefit and prosperity in Europe.

### *The different areas of reform*

Today, I will focus on the reform initiatives in three main areas of EC competition law:

- First, I will speak about the Commission’s proposal to replace the basic Regulation No. 17 of 1962 by a new Council Regulation implementing Articles 81

and 82, the rules prohibiting anti-competitive agreements and abuses of dominant positions.

- Second, I will speak about European Merger Control which, as you know, is governed by the ‘Merger Regulation’ of 1989. In December last, the Commission adopted a Green Paper on Merger review, initiating an ambitious exercise of reexamination.
- Third, I will come to the subject of state aid control, another area that is critical for the over-all protection of competition in the internal market. In this field, the Commission is pursuing an on-going effort to streamline procedures and to improve substance.

### **Modernisation of the rules implementing Articles 81 and 82**

While the application of the antitrust Articles 81 and 82 of the EC Treaty is presently governed by Council Regulation No. 17 of 1962, the Commission has launched a major initiative to modernise the implementation of these rules that was first set out in its White Paper on Modernisation of April 1999. The objective is to replace this venerable regulation by a new Council Regulation which will establish a system of decentralised enforcement, bringing the application of Community competition rules closer to citizens and undertakings.

The text of the future new Regulation is presently the subject of intensive work in the Council of Ministers which, as we hope and expect, should be concluded by the end of this year. Following the adoption of the Regulation, there is likely to be a one-year transition period during which the Commission and Member States will have to complete the new framework by elements needed to put it in practice, e.g. adaptations of national laws (a development that is already on-going) and the production of Commission Notices designed to accompany the new Council Regulation. From the beginning of 2004 we expect that the new system will come into force.

### *The legal exception system*

Under Regulation 17, the application of the derogation Article 81(3), is reserved to the Commission alone and organised in the form of a notification and authorisation system. The reform abolishes this system. Under the future implementing Regulation, Article 81(3) will become a directly applicable provision.

Direct application means that agreements between undertakings that come under Article 81(1), but that fulfil the conditions of Article 81(3), will be legal and fully enforceable without prior intervention of an authority, thus conferring legal certainty on numerous agreements without bureaucratic procedures.

Agreements which fall under Article 81(1) and which do not fulfil the derogation conditions of Article 81(3) are prohibited. They are legally void from the moment of their conclusion without any prior intervention of an authority. The illegality can be invoked in private lawsuits by another party or by someone who has suffered a damage due to the agreement. In addition, companies are subject to enforcement action by the Commission and the Member States' competition authorities.

### *More efficient and effective enforcement*

Some commentators have expressed concern that the absence of notifications would reduce the protection of competition. The contrary is true. The transition to direct applicability for Article 81(3) has several effects that will enhance effective and efficient enforcement of Articles 81 and 82:

First, it will enable the Commission services to do more meaningful enforcement work. Notifications bring to the Commission many unproblematic cases which nonetheless take up considerable resources. Absent notifications, the Commission services will be able to better focus on serious infringements.

Already now, we have considerably stepped up enforcement action in the field of price-fixing and market-sharing cartels. Important achievements can be reported from the Commission's decision practice of last year. In 10 cartel decisions 56 companies were fined a total of €1 836 million, a record figure. The cases decided last year included such examples as the Vitamins cartels, secret market-sharing and price-

fixing cartels affecting vitamin products. Vitamins are widely used in a variety of products spanning from animal feeds to human food products, and from pharmaceuticals to cosmetics. In other words, there are very few consumers in the Union who have not made a contribution to the unlawful gains obtained by the companies concerned by paying a higher price for such products.

### *Decentralisation*

Furthermore, the new implementing system will make it possible that Member States courts and competition authorities become fully involved with the implementation of the EC competition rules.

Notably, the competition authorities of the Member States are preparing actively for the new system. While the work in the Council is still going on, several Member States, who had not done so before, have empowered their competition authorities to apply Articles 81 and 82. Reforms that aim at rendering national procedures more effective are carried out or prepared in a large number of Member States. Authorities are also trying to step up their staff.

The national competition authorities and the Commission already work together closely in many respects. We have been 'networking' for quite some time. The type of meeting between the Heads of the Member States' competition authorities and myself, that we had yesterday here in Athens, is only one example.

The implementation of the new regulation will bring a quantum leap in this respect. The national competition authorities and the Commission will form a network, supported by an electronic infrastructure. A range of information obligations are laid down in the draft Regulation. They should become the backbone of a daily practice of mutual information and cooperation at all levels, fostering a common enforcement culture.

### *Case Allocation*

One of the “frequently asked questions” with regard to the network is the following: Why has the Commission not proposed any rules on the repartition of competence between the different enforcers, for example on the model of the merger regulation ?

In the new system all the competition authorities that form part of the network will have the power to apply Articles 81 and 82 fully to cases affecting trade between Member States. Contrary to Merger control, there will be no notifications to be allocated between different authorities. Cases will be taken up as they present themselves. With economic integration progressing, cases are increasingly varied in their geographic scope and cannot easily be divided in pre-defined categories. The action of the different members of the network must be mutually complementary so as to enable the network to function as a system of communicating vases. If, for example, a national authority is already over-burdened by its case load, the Commission must be able to step in to combat serious infringements wherever they occur in the internal market. During the early years following enlargement of the Union, the new Member States may become a particular focus for the Commission. On the other hand, national authorities should also solve problems that have cross-border implications. Accordingly, the proposed Regulation foresees that national authorities will also be able to exchange confidential information and assist each other in collecting evidence.

In the light of this, to assign cases in advance by way of laying down rigidly defined *exclusive* areas for action would run counter to the objective to step up the protection of competition in the internal market. This is without prejudice to giving extensive guidance to companies, and namely potential complainants, by setting out the every-day division of work between the network members in a Notice. As between the Commission and the Member States, we are further examining the question of laying down certain ‘rules of the game’ in a political text, a joint declaration of the Council and the Commission.

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.

As I said earlier, these are orientations for the every-day operation of the network. They 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, and 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.

### *Article 3*

One of the most delicate elements of the Commission's proposal is the proposed Article 3 providing for the exclusive application of Community competition law to agreements and abusive practices affecting trade between Member States.

The Commission made this proposal for two reasons: First in order to create a level playing field in the internal market and second, in order to ensure that cases affecting trade between Member States are dealt with in close cooperation between all the competition authorities within a network. At the Council meeting of 5 December 2001, a large majority of delegations of Member States expressed their support for these underlying objectives pursued by Article 3.

The present system is based on parallel application of Community law and national law. In practice the Commission applies Community law and the national competition authorities mostly apply national law. It is a system based on separate spheres in which companies often have to check their agreements against a potentially large number of competition laws. With the forthcoming enlargement that number would grow substantially.

In an integrated market, however, it makes great sense to make a fundamental shift from the current separate spheres to a common sphere in which we apply the same law in close cooperation. All players stand to gain from such a change. Companies that conclude agreements with inter-state effects will gain because they only have to check their agreements against a single standard. Consumers and the Community will gain because the rules will be enforced more effectively throughout the Community. The national competition authorities will gain because by joining forces they become fully-fledged partners in the enforcement of the EC rules. They will be involved in the application of these rules not only by the Commission but also by the other Member States.

For the Commission, Article 3 is therefore an essential element of its proposal. We are working in the Council on an acceptable format. A compromise proposal has been put forward by the Belgian presidency that foresees an obligation to apply EC competition law, permitting national authorities to apply national competition law in parallel. However, as regards Article 81, there is a rule ensuring that such parallel application of national competition law is fully convergent with the standard of Article 81(1) and (3). The Commission is prepared to consider this compromise favourably inasmuch as it safeguards the underlying objectives of the proposal.

In other words: Article 81 is the common currency of the competition enforcers. Parallel application of national competition law to agreements capable of affecting trade can best be compared to keeping drachmae, francs and mark alongside the Euro. Nevertheless, the Commission is open to consider a compromise on that basis if it is ensured that the *exchange rate is fixed*.

## **Merger Review**

I will now come to my second topic, the review of the Merger Regulation, launched by the Commission's Green Paper of December last. Although prompted by the requirement in the Regulation itself (Article 1(4)) to review the functioning of the current criteria of case allocation between the Commission and EU Member States, we have this time decided to embark upon a more ambitious review exercise. Our purpose, certainly broader than in the previous revision of 1997, is to try to rebalance



the overall legislative panoply in this field, in order to better equip the Commission in its merger control tasks.

Let me briefly recall some main subjects of the Green Paper which may be roughly categorised in issues pertaining to *jurisdiction*, *substance* and *procedure*.

### *Jurisdictional issues*

The business community have repeatedly emphasised to us their support to the one-stop-shop principle enshrined in the Regulation, as it enhances legal certainty as well as efficient and economical use of resources. The number of multiple filings is likely to rise in an enlarged EU. The Green paper addresses these issues as follows :

It proposes the simplification of the current thresholds as well as of the provisions in Article 9 on the referral of cases to the authorities of Member States. While the turnover thresholds laid down in Article 1 (2) are to be maintained, it is proposed to replace Article 1(3) by an automatic Commission competence whenever it is certified that a concentration would fall under the jurisdiction of at least three Member States. A specific concept of pre-notification "network" contacts has to be imagined in order to make this system operational. It would involve the parties as well as national authorities at an early stage. At the same time and in an attempt to "de-dramatise" the referral process, it is proposed to simplify the test laid down in Article 9 (2) designed to allow Member States to identify the cases suitable to be referred back to them.

There are several practical, principally procedural, issues which will need to be tackled and clarified in case these reforms pass through the Council. Thus, we foresee the need to elaborate flanking guidelines on the modalities of the outlined new referral procedure.

## *Substance*

Let me now pass on to *substantive issues*: A most attractive chapter of the Green Paper raising some intellectually stimulating questions is the one about the substantive test for the assessment of concentrations.

The Green paper attempts a neutral and balanced presentation of the features of the "dominance" test, as enshrined in the Regulation and as interpreted by the European Courts, and of the "substantive lessening of competition" test, used notably by the US antitrust agencies and favoured by some EU jurisdictions. There are a number of questions we will need to reflect upon :

- Is the "dominance" test in practice a straightjacket when it comes to an effects analysis which does not have to rely on blunt market shares figures?
- Does it really accommodate sophisticated economic analysis?
- Does the "substantive lessening of competition" test really allow more discretion to the US agencies?

We find that the time is ripe for opening this debate and we believe this will also be a useful learning exercise on the comparative merits of the possible ways to make a competition analysis.

The chapter on substantive issues also mentions the success of the simplified procedure introduced in September 2000, in enhancing the efficiency of European merger control. About 40% of the cases notified since have fallen under this procedure. The Green Paper sets out some proposals aiming at improving the current practice for cases which do not raise competition concerns. Simplifying the Form CO could be one such measure.

## *Procedures*

In the field of *procedures*, the Green paper opens a discussion on a number of technical issues, including the question of anticipating the notification triggering event in order to facilitate the alignment of timetables between competition authorities on the two sides of the Atlantic. We have also taken the opportunity to invite

comments on issues pertaining to suspension, calculation of time limits and completeness of notification. Provision must also be made that the parties' remedies proposals are fully and properly scrutinised by the Commission, the relevant market participants as well as Member States. We believe, in this respect, that the possibility to "stop the clock" for up to a certain period of time, in both phases, and at the parties' request, will allow the additional time necessary for a proper consideration of the remedies by all the actors mentioned above.

Finally, under the chapter on due process, we illustrate the merits of the EU system of internal procedures and checks and balances organised in a way which reflects the working methods and the special nature of the Commission as an administration. This is not done in a defensive spirit. The success of certain elements in the system has been widely acknowledged, and any reform can only build upon these elements. I notably mean the timeliness and the transparency of the system. Regarding "checks and balances", I only want to mention the recently reinforced mandate of the Hearing Officer.

We have conducted this exercise with an open mind and have invited comments and proposals which will improve the system. The public consultation period on the Green Paper has ended a few weeks ago. The input provided to the Commission has been impressive. We are currently analysing it thoroughly and hope to publish the results in the near future. Our "working target" is to have a proposal for amending the Merger Regulation adopted by the Commission by the end of 2002. It will then be for the Greek Presidency to start negotiations in the Council.

### **Modernising State aid control**

The Commission's reform activities are not limited to anti-trust and merger control, but also include the other pillar of competition policy: State aid control. As you know, we have in the EU a unique system of State aid control, under which Member States must notify and obtain Commission approval in advance for all their plans to grant State aid. The challenge, which has some similarities to anti-trust, is to establish simple procedures to deal quickly and efficiently with routine cases so that the

available resources can be devoted to the investigation of cases which present important competition problems.

During the last years, the Commission has carried out a broad modernisation process in order to make State aid control more effective, to simplify the control system for less important cases and to increase transparency and legal certainty. The most important results achieved so far are, first of all, the adoption in 1999 of a procedural regulation, which for the first time codified State aid control procedures in one single binding text while strengthening the control powers at the same time.

The second instrument of reform are the block exemption regulations covering certain categories of horizontal State aid which usually can be authorised without problems. In the beginning of 2001 the first block exemptions, concerning State aid for small and medium-sized enterprises and for training aid entered into force. While in the past any aid measure had to be notified in advance to the Commission, aid fulfilling the conditions of the regulations can now be granted without prior notification and authorisation by the Commission. This improves the efficiency of state aid control, since it relieves the Commission from a number of unproblematic routine cases and allows it to concentrate on the serious distortions of competition.

The block exemption regulations benefit not only the Commission, but also the national, regional and local administrations in Member States, since the procedure for granting aid can be much quicker and the administrative burden is reduced. Finally, due to their direct applicability, group exemption regulations grant more responsibility to national bodies. National authorities have to check themselves whether their aid schemes are within the limits of a group exemption regulation. Furthermore, national courts, upon actions brought by complainants, may be requested to decide whether the block exemption has been complied with. In this sense, block exemption regulations contain a limited element of decentralisation without therefore entailing a lesser degree of control or a relaxation of the rules on State aid.

The Commission is currently preparing a third exemption regulation concerning employment aid. It adopted a draft proposal on 2 October 2001, on which it consulted

Member States in the Advisory Committee on state aid on 7 December. The draft regulation proposes to exempt from notification, under certain conditions, aid to create new employment, aid to recruit disadvantaged categories of worker, and aid to meet the additional costs of employing of disabled workers.

The positive effect of these reforms has been generally recognised. However, the reform process does not stop there. On the contrary, the Commission is reflecting on ways to further streamline and modernise both the procedures and the substantive rules on State aid.

Regarding State aid procedures, it is true that they are often perceived as being unnecessarily onerous and time-consuming. Certainly, in cases where it is necessary to launch a formal investigation procedure, the procedures are lengthy, also because of the procedural guarantees for third parties and Member States in the course of the procedure. However, it should also be recognised that a substantial majority of routine notified aid cases are in fact approved within acceptable delays. The Commission services are currently examining how procedures for dealing with such cases can be further simplified. Although certain measures can be taken unilaterally by the Commission, other steps will require the active support of Member States. I therefore invite you to closely cooperate with my services when we will come forward with concrete reform measures in the course of this year.

Among the issues to be tackled, I could mention: improvement of the notification process through standard forms and electronic notifications; further simplification measures for dealing with aid measures that do not seriously threaten competition; acceleration of the formal investigation procedure; the setting of priorities in dealing with complaints; a strict policy on illegal aid, etc. The measures envisaged will make it necessary to review also some aspects of the relations between the Commission services and the Member States, in particular with the aim of speeding-up the decision-making. These reform measures are necessary to prepare the Commission for the next enlargement and to ensure that State aid control is well equipped to fulfil its role in competition policy.

## **Conclusion**

While each of the three areas mentioned has its particularities that must be respected, the over-all objective is the same: to achieve more effective and more efficient enforcement of the EC competition law framework :

- By making the most of the expertise built up at national level ;
- By simplifying the legal framework in order to make it easier to comply with;
- By removing unnecessary bureaucracy.

Through these reforms the Community system demonstrates its capacity to adapt to change. Modernisation of our concepts and working methods is necessary to live up to the challenges of globalisation and the enlargement of the Union. It is essential to ensure the credibility of one of the centres of excellence within the Commission, an institution which does not need popularity but which cannot play its role if it is not broadly respected as a central partner for each of our national competition authorities.