ENFORCEMENT OF COMPETITION RULES: COMMISSION'S WHITE PAPER

Subject: Notification
Exemption
National courts

Industry: All industries

Source: Commission Statement IP/99/275, dated 28 April, 1999

(Note. If space allows a more detailed treatment of the proposals contained in the Commission's White Paper of the reform of the system for enforcing the rules on competition, the subject will covered in subsequent issues. In the meantime, the following statement by the Commission outlines the proposals. Essentially, the reforms are based on the proposition that Article 85 should be directly applicable and should not be subject to the notification and exemption procedures laid down in Regulation 17 of 1962. The Commission is inviting comments on its proposals. It is worth noting that, perhaps in the light of a series of critical court cases, the Commission intends to treat the investigation of complaints as a matter of "greater importance".)

Current system of enforcement

In 1962, the Council instituted an enforcement system of EEC competition rules which gave the Commission the exclusive power to exempt restrictive practices (Article 85(3) of the EC Treaty) and required companies to notify their agreements to the Commission before any exemption. It has not been significantly modified since then. This highly centralised authorisation system was necessary in the early 1960s. It ensured the development of a coherent corpus of decisions and proved very effective for the establishment of a culture of competition in Europe.

Today, the EU faces new challenges. Enlargement from a Union of 15 Member States, 11 official languages and over 350 million inhabitants, to one with 20 or 25 Member States is expected. Economic and monetary union is under way and will be certain to have major consequences for competition policy, as will the continuing globalisation of the economy. In this changed environment, a centralised authorisation system will no longer ensure effective application of the EU competition rules. A new system, building on the case-law and decision-making practice of the last 35 years, is needed to meet the challenges of the future

Proposal for reform

In its White Paper the Commission proposes the abolition of the notification and exemption system laid down in the present Regulation No 17 of 1962. It proposes to send the Council a proposal for a new Regulation which would render Article 85 EC Treaty in its entirety directly applicable by the Commission, national competition authorities and national courts. This is already the case for Article 86 of the EC Treaty (abuses of dominant position).

This reform pursues three main objectives.

First Objective: Rigorous enforcement of competition law

The Commission must concentrate its limited resources on the most serious infringements of EU law (such as price-fixing and market-sharing cartels) which are almost never notified. The Commission should also concentrate on the most important cases involving a real EU interest.

To this end, the White Paper proposes strengthening the present system for enforcing the prohibition rules in Articles 85(1) EC Treaty and 86 EC Treaty. The aim is to ensure that the Commission has appropriate and efficient means to act against the most serious restrictions of competition.

Investigation of complaints lodged with the Commission will take on greater importance in the new enforcement system. Complaints from victims of anti-competitive practices are a valuable source of market information and the Commission proposes to concentrate more resources on their investigation. To facilitate this goal, procedures for the handling of complaints would be simplified. In particular, a time limit of four months would be introduced within which the Commission would be obliged to inform complainants of whether it intends to investigate their complaint in detail.

This is in line with the ultimate aim of the competition rules which is to ensure that European consumers do not suffer from artificially high prices.

Second Objective: Effective decentralisation

The Commission alone cannot ensure the effective application of the competition rules. There is an urgent need for more decentralised application which would be achieved by rendering Article 85 EC Treaty in its entirety, together with Article 86, directly applicable. The Commission, national competition authorities and national courts would then have concurrent powers to apply the EU competition rules. This decentralised application would considerably strengthen their effectiveness.

In the new decentralised enforcement system, it would be necessary to ensure a coherent application of the rules throughout the Union. The White Paper proposes several mechanisms to that end. First, the Commission would keep a leading role in determining EU competition policy both through the adoption of legislative and other general measures, such as block exemption regulations and guidelines, and through the adoption of leading decisions in individual cases. Secondly, the Commission would enforce the rules as part of a network of competition authorities in which it would play a central role as guardian of the Treaty. The Commission's right to withdraw from national competition authorities cases, in particular where there was a risk of incoherent application of the rules, would be maintained. Thirdly, the White Paper contains a number of more detailed mechanisms aimed at preventing conflicts between the decisions taken by national courts, national competition authorities and the Commission.

The application of the EU rules by national courts would, as with all other directly applicable provisions of the EC Treaty, be supervised by the European Court of Justice. The Commission also proposes assistance to national courts to help national judges apply the EU competition rules in a coherent manner.

Third Objective: Simplification of control procedures

The abolition of the notification system would relieve companies of the burden and cost of notifications. A satisfactory degree of legal certainty would be maintained for business; in certain respects it would be enhanced. In particular, the new system would allow companies to obtain civil enforcement of their contracts in national courts from the date of their conclusion if, on balance, they are pro-competitive. Centralised authorisation of individual agreements by the Commission would no longer be required. Companies would also benefit from the fact that this reform would encourage Member State authorities to apply EU competition rules more frequently. This should be a strong factor in favour of market integration.

Background

In the field of competition law applicable to undertakings, the EC Treaty sets out general rules applicable to restrictive practices (Article 85, EC Treaty) and abuses of a dominant position (Article 86, EC Treaty). The Treaty empowers the Council to give effect to these provisions (Article 87, EC Treaty). The first implementing Regulation, Regulation 17, was adopted by the Council in 1962.

Regulation 17 created a system based on direct applicability of the prohibition rule of Article 85(1), EC Treaty, and prior notification of agreements for exemption under Article 85(3), EC Treaty. While the Commission, national courts and national authorities can all apply Article 85(1), EC Treaty, the power to grant exemptions under Article 85(3) was granted exclusively to the Commission. Regulation 17 thus established a highly centralised authorisation system for all agreements requiring exemption.

Article 86, EC Treaty, can already be applied by the Commission, national courts and national authorities.

The proposed reform does not affect the regime for the control of concentrations of a Community dimension (the Merger Regulation), with the sole exception that its scope will be extended to include production joint ventures. □

Readers who are interested in the Conference Report on the recently held Internet Conference, under the aegis of the Franklin Pierce Law Center in Concord, New Hampshire, on "The Impact of Competition (Anti-Trust) rules on Intellectual Property", are invited to communicate with the conference moderator, Bryan Harris, by e-mail: bharris@fplc.edu