IMPLEMENTING RULES: COMMISSION PROPOSAL

Subject: Implementing rules (EC Rules on competition)

Industry: All industries

Source: Commission Proposal for a COUNCIL REGULATION on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87

(Note. The Commission's paper, containing its proposal for a Council Regulation, replacing Regulation 17 of 1962, has two parts: an explanatory memorandum and the text of the proposed regulation. The memorandum is itself divided into two parts: a general explanation of the principles and a detailed explanation of each of the proposed articles. The report which follows is the first part of the general explanation; the second part will appear in our next issue and will cover: the consistent application of Community competition law; legal certainty for companies and a reduction of bureaucracy; and subsidiarity and proportionality. The Commission's aims are in general admirable, though some of the interests consulted while the proposal was in course of preparation have expressed concern about the legal certainty of any new regime. Fewer rules may lead to less bureaucracy but may leave uncertain areas. Whether the new regime really involves fewer rules is not entirely self-evident; they are different and they relieve the burden created by the duty to notify. But a great deal depends on how they are applied and how far the Commission will in practice take the initiative in looking for possible infringements. It may not need to: the number of complaints from traders aggrieved by alleged infringements has been steadily rising in recent years.)

EXPLANATORY MEMORANDUM

General

The Community competition rules were established in its founding Treaty of 1957. Article 81 sets out the rules applicable to restrictive agreements, decisions and concerted practices, while Article 82 concerns abuses of dominant positions.

In 1962, the Council adopted Regulation No 17, which sets out the rules of procedure for the application of Articles 81 and 82 of the Treaty which have been applied till today without any significant modifications. Regulation No 17 was based on direct applicability of the prohibition rule of Article 81(1) and prior notification of restrictive agreements and practices for exemption under Article 81(3). While the Commission, national courts and national competition authorities can all apply Article 81(1), the power to apply Article 81(3) was granted exclusively to the Commission. Regulation No 17 thus established a

highly centralised authorisation system for all restrictive agreements requiring exemption. In contrast, Article 82 has always been enforced in parallel by the Commission, nationalcourts and national authorities.

This system was well suited for a Community of six Member States in which there was little competition culture. It allowed the development of Community competition law and its consistent application throughout the Community. However, today the context has changed fundamentally. The European Union now has 15 Member States, whose markets have already been extensively integrated, 380 million inhabitants, and 11 official languages. National competition authorities have been set up in the Member States and national competition laws have been enacted, many reflecting the content of Articles 81 and 82.

In this new context, the current system presents two major deficiencies. First, it no longer ensures the effective protection of competition. The Commission's monopoly on the application of Article 81(3) is a significant obstacle to the effective application of the rules by national competition authorities and courts. And in a wide Community, the Commission alone cannot bear the responsibility for enforcing the competition rules throughout the Union. Furthermore, the notification regime no longer constitutes an effective tool for the protection of competition. It only rarely reveals cases that pose a real threat to competition. In fact, the notification system prevents the Commission's resources from being used for the detection and punishment of serious infringements.

The second deficiency of the current system is that it imposes an excessive burden on industry by increasing compliance costs and preventing companies from enforcing their agreements without notifying them to the Commission even if they fulfil the conditions of Article 81(3). This is particularly detrimental to SMEs for whom the cost of notification and in the absence of notification, the difficulty of enforcing their agreements can constitute a competitive disadvantage compared with larger firms.

The perspective of the enlargement of the Community makes it even more urgent to proceed with a reform of Regulation No 17. A Union with 25 or even more Member States is now in prospect. A notification system with prior authorisation by one administrative body would be completely unsustainable in an enlarged Community, since, potentially, thousands of agreements would require administrative clearance in order to be enforceable. Direct application of Article 81(3) would ensure that agreements fulfilling the conditions of that provision were legally enforceable without recourse to an administrative body being necessary.

The White Paper and the consultation process

In order to prepare Community competition law for the challenges of the coming years, the Commission initiated the reform process by adopting and publishing in 1999 a White Paper on modernisation of the rules implementing Articles 81 and

82 of the EC Treaty.

The White Paper examines various options for reform and proposes the adoption of a fundamentally different enforcement system called a directly applicable exception system. Such a system is based on the direct applicability of the exception rule of Article 81(3), implying that the Commission and national competition authorities and courts would apply Article 81(3) in all proceedings in which they are called upon to apply the prohibition rule of Article 81(1), which is already directly applicable.

The White Paper was adopted on 28 April 1999. Interested parties were invited to submit comments by 30 September 1999. The European Parliament organised a public hearing on 22 September 1999. It adopted a resolution on 18 January 2000. The Economic and Social Committee adopted an opinion on 8 December 1999. The Commission has received and carefully examined submissions from all Member States and more than 100 interested parties, including submissions from EFTA countries, the ESA, and competition authorities from Estonia, Hungary and the Czech Republic. A working group composed of Commission officials and experts from the national competition authorities has discussed the content of the White Paper in a number of meetings.

The European Parliament and the Economic and Social Committee support the Commission's proposal while insisting on the importance of ensuring consistent application of Community competition law in a system of parallel powers and of maintaining an adequate level of legal certainty.

The positions of industry associations and lawyers are varied. Many welcome the Commission's approach as a more efficient and less bureaucratic alternative to the present system of implementation, which is almost universally considered unsatisfactory. However, many also stress the need to ensure that the reform does not lead to inconsistent application and renationalisation of Community competition law and that the reform does not reduce legal certainty for companies.

The proposal for a new regulation is in its main parts based on the White Paper, taking due account, however, of the major preoccupations expressed in the consultation process. The question of extending the procedures of the Merger Regulation to partial-function production joint ventures, that was also raised in the White Paper (nos. 79-81), will be further examined in the context of forthcoming reflections on the revision of that regulation.

Subject

The subject of the proposal is the reform of the implementing regulations for Articles 81 and 82 of the EC Treaty, that is, Regulation No 17 and the corresponding transport regulations. It is proposed to create a new enforcement system referred to as a directly applicable exception system. In such a system, both the prohibition rule set out in Article 81(1) and the exception rule contained in Article 81(3) can be directly applied by not only the Commission but also

national courts and national competition authorities. Agreements are legal or void depending on whether they satisfy the conditions of Article 81(3). No authorisation decision is required for enforcing agreements complying with Article 81 as a whole. This is already the existing enforcement system for Article 82 of the EC Treaty.

Legal basis

The legal basis for the present proposal is Article 83 of the EC Treaty. Article 83 empowers the Council to lay down the appropriate regulations or directives to give effect to the principles set out in Articles 81 and 82. In a non-exhaustive list, Article 83(2) mentions elements that should in particular be covered by implementing rules created on this basis.

The legal basis in Article 83 covers the application of Articles 81 and 82 in general. In particular, it is not limited to the application of the rules by specific decision-makers. The Community legislature, within the limits of the general principles of the Treaty, is therefore empowered to lay down rules on the application of Articles 81 and 82 by bodies other than the Community institutions as well as rules on the interaction between the different decision-makers. Accordingly, the proposed Regulation provides for certain rules to be respected by national competition authorities and/or courts when applying Articles 81 and 82 as well as rules on cooperation between them and with the Commission.

Article 83(2)(b) expressly provides for the Community legislature to lay down detailed rules for the application of Article 81(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest extent possible on the other. The legal basis in Article 83 thereby enjoins the Community legislature to fill a lacuna left by Article 81. Leaving aside Article 81(2), Article 81 is divided into a prohibition rule (Article 81(1)) and a rule according to which the prohibition may be declared inapplicable if stated conditions are satisfied (Article 81(3)). It does not, however, lay down by what procedure the prohibition may be declared inapplicable, and by whom. In particular, the words 'may be declared inapplicable', unlike the words 'the High Authority shall authorise' used by the ECSC Treaty (see Article 65 of the ECSC Treaty), do not define a specific procedure.

The existing Regulation No 17 granted exclusive power to the Commission to apply Article 81(3) in the framework of an administrative procedure aiming at an authorisation decision. Article 81(3) is however suitable for direct application. While leaving a certain margin of appreciation as to its interpretation, Article 81(3) does not imply discretionary powers that could only be exercised by an administrative body. A limited margin of appreciation does not make a Treaty provision unsuitable for direct application, as is clear from the case-law on for instance Article 81(1) and Article 82, which are already directly applied by national courts.

There is no indication in the Treaty to contradict this conclusion. In particular, the words "to simplify administration to the greatest extent possible" in Article

83(2)(b), while imposing on the legislature the objective of a minimum of procedural bureaucracy, do not exclude the application of Article 81(3) by courts in addition to administrative bodies. Under the powers granted to it by Article 83, the Community legislature can choose an implementing system that is based on direct application of Article 81(3).

Article 83(2)(e) states that the Community legislature is also empowered to define the relationship between national laws and the Community rules on competition. Regulation No 17 refrained from regulating this relationship, which has led to long-standing debates and to legal uncertainty. The Court of Justice was able to clarify some of the issues involved by applying the principle of primacy of Community law over national law. Given the specificity of Article 81 in particular, the solutions found on that basis do not, however, cover the entirety of cases in which conflicts can arise. In addition, the change to a new implementing system risks to reopening the debate and creating new legal uncertainties as to this fundamental issue. The proposed Regulation therefore lays down a rule regulating the relationship between Community competition law and national law.

Finally, Article 83 is also the appropriate legal basis for regulating the application of Articles 81 and 82 to the transport sector. This was not yet clear when Regulation (EEC) No 1017/68 was adopted: it had two legal bases, the former Articles 75 and 87, now Articles 71 and 83. However, the Court of Justice has since held that the Community competition rules apply in full to the transport sector. [See Joined Cases 209 to 213/84, *Nouvelles Frontières*, and Case 66/86, *Ahmed Saeed*.] The Community legislature can therefore provide that the application of Articles 81 and 82 to agreements and decisions presently governed by Regulation (EEC) No 1017/68 is integrated into the proposed Regulation on the legal basis of Article 83. The same goes for the application of Articles 81 and 82 to the maritime transport sector presently governed by Regulation (EEC) No 4056/86. The latter regulation, although adopted subsequently to the abovementioned case-law of the Court of Justice, and in contrast to the Commission proposal (based on Article 87 (now 83) alone), was also based by Council on the former Article 84(2) (now 80(2)), owing to the inclusion of Article 9 of that Regulation concerning relations with third countries. The difference of opinion between the Council and the Commission does not need to be resolved in the present instance, as the proposed Regulation leaves Article 9 of Regulation (EEC) No 4056/86 untouched.

More efficient protection of competition

The proposal aims at increasing the protection of competition in the Community. This will be achieved by the proposal in three ways.

More enforcers

The proposed system will result in increased enforcement of Community competition rules, as in addition to the Commission, national competition authorities and national courts will also be able to apply Articles 81 and 82 in

their entirety.

National competition authorities, which have been set up in all Member States, are generally well equipped to deal with Community competition law cases. In general, they have the necessary resources and are close to the markets.

As regards the applicant countries, considerable progress has already been made in establishing national competition authorities. Even if initially they may not all possess sufficient resources to ensure the effective protection of competition, the proposed reform will allow the Commission to step up enforcement in those parts of the enlarged Community. The proposed discontinuation of the notification and exemption system ensures that all available resources can be used for the effective protection of competition.

It is a core element of the Commission's proposal that the Commission and the national competition authorities should form a network and work closely together in the application of Articles 81 and 82. The network will provide an infrastructure for mutual exchange of information, including confidential information, and assistance, thereby expanding considerably the scope for each member of the network to enforce Articles 81 and 82 effectively. The network will also ensure an efficient allocation of cases based on the principle that cases should be dealt with by the best placed authority.

National courts will also play an important and enhanced role in the enforcement of Community competition rules. Unlike national authorities or the Commission, which act in the public interest, the function of national courts is to protect the rights of individuals. They can grant damages and order the performance or non-performance of contracts. They are the necessary complement to action by public authorities.

The Commission's proposal aims at promoting private enforcement through national courts. Both Article 81(1) and Article 81(3) confer rights on individuals, which should be protected by national courts. The present division of powers under Article 81 is not in line with the important role that national courts play in the enforcement of Community law in general. In the present Regulation No 17 the authorisation system and the Commission's monopoly on the application of Article 81(3) make application of Article 81(1) by national courts very difficult. The fact that the elimination of this obstacle may lead to more application of Article 81 and thereby increase the case load on national courts is not a valid argument against the reform. Such considerations should not be allowed to hamper the implementation of a reform that aims at strengthening the enforcement of the rules and at enhancing the protection of individual rights.

Refocusing the Commission's action

The second way in which the proposal will increase the protection of competition is by allowing the Commission to concentrate on the detection of the most serious infringements. Experience in the last decades has shown that notifications do not bring to the attention of the Commission serious violations of the competition

rules. The handling of a large number of notifications prevents the Commission from focusing on the detection and the punishment of the most serious restrictions such as cartels, foreclosure of the market and abuses of dominant positions. In the proposed system, the abolition of the notification and authorisation system will allow the Commission to focus on complaints and own-initiative proceedings that lead to prohibition decisions, rather than establishing what is not prohibited. The Commission intends to issue a notice providing potential complainants with guidance on the treatment of complaints. The notice will inter alia set a deadline within which the Commission should inform the complainant whether it intends to deal with its complaint.

Increased powers of investigation for the Commission

In order to guarantee the protection of competition, it is also necessary to ensure that the Commission's powers of investigation are sufficient and effective. Under the existing Regulation No 17, the Commission can conduct inspections on the premises of companies and make written requests for information. It can fine companies for infringements of substantive and procedural rules and impose periodic penalty payments.

Three main improvements of the current system are required to ensure a more effective application of Articles 81 and 82.

First, the rules governing the obtaining of judicial orders at national level in order to overcome any opposition on the part of an undertaking to an inspection should be codified. This will clarify the intervention of national judges in accordance with the limits established by the Court of Justice.

Secondly, it is necessary to adapt the powers vested in Commission officials during inspections: they must be empowered, subject to judicial authorisation, to search private homes if professional documents are likely to be kept there. The experience of the national competition authorities and the Commission shows that incriminating documents are ever more frequently kept and discovered in private homes. Commission inspectors should also be empowered to seal cupboards or offices in order to ensure that documents are not removed and destroyed. Finally, they should be entitled to ask oral questions relating to the subject matter of the inspection.

Thirdly, the fines for breaches of procedural rules and the periodic penalty payments, which were set in absolute terms in the sixties, must be increased. A system based on turnover percentage figures is considered the appropriate solution.

Competition laws have an immediate impact on the commercial activities of companies, as they have to adapt to the prevailing standard in any given area. For companies that engage in activities having cross-border effects it is therefore important that there be a level playing field throughout the European Union, allowing them to reap the full benefits of the single market.

The present proposal will create a more level playing field in two ways. First, Community competition law will be applied to more cases, thereby limiting the scope for inconsistencies caused by differences in national competition laws. Secondly, a number of measures will ensure that Articles 81 and 82 are applied in a consistent manner by the various decision-makers involved in their application.

Wider application of Community competition law

In the present enforcement system, several national systems of competition law and Community competition law may apply concurrently to the same transaction to the extent that an agreement or practice is capable of affecting trade between Member States. The application of national law is constrained only by the principle of primacy of Community law.

Several national systems of competition law have been modelled on Articles 81 and 82. However, no formal harmonisation is in place, and differences remain both in law and practice. Such differences can lead to different treatment of agreements and practices that affect trade between Member States.

In order to promote a level playing field for companies that engage in agreements or practices that have a cross-border effect, it is necessary to regulate the relationship between national law and Community law, as provided in Article 83(2)(e) of the EC Treaty. Accordingly, Article 3 of the proposed Regulation provides that only Community competition law applies when an agreement, decision or concerted practice within the meaning of Article 81 or abusive conduct within the meaning of Article 82 is capable of affecting trade between Member States. This rule ensures in a simple and effective way that all transactions with a cross-border effect are subject to a single body of law.

The proposal not only creates a level playing field throughout the European Union, it also facilitates an efficient allocation of cases within the network of competition authorities, the aim being that cases should be dealt with by the best placed authority. In several Member States the competition authority, once seized of a case, is obliged to come to a formal decision. Such obligations may hinder reallocation of cases to a better placed authority. To overcome this problem in respect of the application of Articles 81 and 82 the Regulation empowers a competition authority to suspend a proceeding or reject a complaint on grounds that another competition authority is dealing with or has dealt with the case. However, the scope of this provision is limited to the application of Community competition law. Article 3 of the proposed Regulation ensures that an efficient allocation of cases is not hindered by simultaneous application of national law in respect of which a national competition authority may remain bound to come to a formal decision. Parallel application of national and Community competition law should be avoided because it leads to unnecessary parallel proceedings. ■

The full text of the Bayer case, reported on page 291, is freely available on the website of the Court of Justice of the European Communities; the text is not definitive.