IMPLEMENTING RULES: COMMISSION PROPOSAL (PART II)

[This completes the Explanatory Memorandum begun in our last issue, relating to the Commission Proposal for a new Council Regulation replacing Regulation 17.]

Consistent application of Community competition law

The application of the same law and policy will in itself promote consistency throughout the single market. The application of Articles 81 and 82 by national competition authorities and courts will be subject to Community block exemption regulations, creating safe harbours for defined categories of agreements. Further guidance will be provided by guidelines adopted by the Commission. Application by national competition authorities and courts will also be subject to the case-law of the Court of Justice of the European Communities and the Court of First Instance as well as the administrative practice of the Commission. In the latter respect, it is proposed in Article 16 of the proposed Regulation to impose on national competition authorities and courts an obligation to use every effort not to contradict a Commission decision. More decision-makers also mean more case-law and administrative decisions, which will further clarify the scope of the Community competition rules. Moreover, there will be a number of additional instruments aiming at ensuring that Articles 81 and 82 are applied in a consistent manner.

The application of the Community competition rules by national courts will be subject to the preliminary reference procedure of Article 234 of the EC Treaty. The Court of Justice of the European Communities will play the same important role in ensuring consistency as it has done and continues to do in other areas of Community law. As the proposal aims at increasing the level of private enforcement before national courts, an initial increase in Article 234 references can be expected. A significant increase, however, is unlikely, as it is expected that most litigation before national courts will concern areas where the law has been clearly established.

Article 15 of the proposed Regulation codifies the existing obligation of the Commission, based on Article 10 of the Treaty, to cooperate with national courts. This cooperation includes a right for national courts to ask the Commission for information in its possession or for its opinion on questions concerning the application of the Community competition rules. It is expected that the importance of this mechanism will increase once national courts are empowered to apply Article 81(3) as well. Article 15 also proposes to vest in the Commission the power to submit written or oral submissions to national courts at its own initiative and in the Community public interest. This will allow the Commission to contribute to the consistent application of Community competition law by national courts. It is also proposed that the national competition authorities be empowered to make oral and written submissions to their national courts.

With regard to the national competition authorities, the creation of a network in

which all members apply the same law and policy will greatly promote consistency and a level playing field throughout the single market. The formal basis for establishing the network is found in Article 11 of the proposed Regulation, according to which the national competition authorities and the Commission are to apply the Community competition rules in close cooperation. The details of this cooperation will be developed in a notice. The network will foster the development of a common competition culture throughout the Community. In addition, certain formal mechanisms are established to ensure consistent application, including a consultation procedure for certain types of decisions adopted by national competition authorities (see Article 11(4) of the proposed Regulation). This provision requires national competition authorities to consult the Commission prior to the adoption of prohibition decisions, decisions accepting commitments and decisions withdrawing the benefit of a block exemption regulation. All such decisions have direct repercussions for the addressees. It is therefore important to ensure that these decisions are consistent with the general practice of the network. In case of substantial disagreement within the network, the Commission retains the power to withdraw a case from a national competition authority by itself initiating proceedings in the case.
It is not necessary for consistency purposes to provide for prior consultation in respect of other types of decisions adopted by national competition authorities, such as rejections of complaints and decisions to take no action. These decisions bind only the deciding authority, and do not preclude subsequent action by any other competition authority or before national courts. As regards decisions adopted by the Commission, it is proposed to maintain the present obligation for the Commission to consult the Advisory Committee on Restrictive Practices and Dominant Positions.

An adequate level of legal certainty for companies and a reduction of bureaucracy

Under the existing Regulation 17 an agreement or decision caught by Article 81(1) can become valid, i.e. enforceable before a civil court, only if it is notified to the Commission and is exempted by the Commission. In practice, most notified cases are closed by a non-binding administrative letter from the Commission services (a "comfort letter"). The proposed Regulation removes the bureaucratic obstacles connected with the notification and authorisation procedure while maintaining an adequate degree of legal certainty. In particular, the proposed Regulation provides that agreements and decisions which satisfy the conditions of Article 81(3) are valid and enforceable ab initio with no administrative decision being required to that effect. Undertakings can therefore rely on civil enforceability as an element of improved legal certainty independently of any action by an administration.

The proposed Regulation does not remove the necessity for undertakings to assess their business transactions to verify whether they are in compliance with the competition rules. Under the present Regulation 17, this analysis is carried out by undertakings when preparing a notification. The proposal assimilates the application of the Community competition rules to other areas of law where undertakings are required to ascertain themselves that their behaviour is legal.

In the field of Community competition law, companies' task of assessing their behaviour is facilitated by block exemptions and Commission notices and guidelines clarifying the application of the rules. As a complementary element of the current reform, the Commission commits itself to an even greater effort in this area. Article 28 of the proposed Regulation confers on the Commission a general power to adopt block exemption regulations. This power will ensure that it is in a position to react with sufficient speed to new developments and changing market conditions. In addition, under the new system, with the larger number of decision-makers applying Article 81(3), case-law and practice on its interpretation will rapidly develop where they do not yet exist, thereby inherently reinforcing the framework for assessment.

The Commission will further contribute to this development by continuing to set policy through its own decisions in individual cases. In addition to prohibition decisions, the proposed Regulation provides that in cases where it is in the Community public interest to do so the Commission, acting on its own initiative, can adopt decisions finding that no infringement has been committed. This will permit the Commission to set out its position in a landmark case so as to clarify the law for all companies that find themselves in similar situations.
Finally, the Commission will remain open to discuss specific cases with the undertakings where appropriate. In particular, it will provide guidance regarding agreements, decisions or concerted practices that raise an unresolved, genuinely new question of interpretation. To that effect, the Commission will publish a notice in which it will set out the conditions under which it may issue reasoned opinions. Any such system of opinions must not, however, lead to companies being entitled to obtain an opinion, as this would reintroduce a kind of notification system.

Subsidiarity and proportionality

In the interest of the single market, the proposed Regulation ensures that Community competition law should be applied to agreements and practices capable of affecting trade between Member States, thereby creating a level playing field throughout the Community. At the same time, the proposal ensures that the application of that law takes place at the most efficient level. Under the proposal, the Commission shares the power to apply Article 81(3) with national competition authorities and national courts, thereby enabling these bodies to apply Articles 81 and 82 effectively. The scope for effective intervention at national level is substantially increased by the cooperation mechanisms contained in Articles 12 and 21 of the proposed Regulation, which empower national competition authorities to exchange confidential information and to assist each other in respect of fact-finding. As a result of market integration evidence and information will increasingly be located in several Member States. Enhanced horizontal cooperation will make it easier for national competition authorities to obtain all the relevant facts.

The Commission's proposal is thus fully in line with the principle enshrined in Article 5 of the Treaty, according to which action should be taken at the most efficient level. While promoting the Community interest in a level playing field

throughout the single market, the proposal ensures that national competition authorities and courts can apply Articles 81 and 82 fully and effectively to all cases in respect of which intervention at national level is more efficient.

The Commission, being the only authority that can act throughout the European Union, will necessarily continue to play a central role in the development of Community competition law and policy and in ensuring that it is applied consistently throughout the single market, thereby preventing any renationalisation of Community competition law. The development and application of the law and policy will, however, be a concern of all the competition authorities involved in the enforcement of Articles 81 and 82. Policy issues will be the subject of discussion within the network. The proposal does not go beyond what is necessary to achieve the objectives of the Treaty. The Treaty aims, inter alia, to create an internal market and a system of undistorted competition. The very objective of the present proposal is to enhance the protection of competition and to create a level playing field throughout the Community.

The proposal to exclude the application of national competition law to agreements and practices that affect trade between Member States is necessary in order to ensure that such agreements and practices are subject to a single set of rules. This is essential in order to ensure that competition in the internal market is not distorted as a result of differences in the legal framework and to ensure that cases can be allocated efficiently within the network. Effective case allocation also makes it necessary that the members of the network should inform each other of all new cases and exchange relevant case-related information. Moreover, provision must be made for prior consultation by the national competition authorities in respect of prohibition decisions, decisions accepting commitments and decisions withdrawing the benefit of a block exemption regulation.

Inconsistencies in respect of these types of decisions would be detrimental to the single market and the objective of creating a level playing field throughout the Community. Such decisions also have important implications for the common competition policy of the network. The Commission will associate the other members of the network in the consultation process. The functioning of the network will be further elaborated upon in a notice on cooperation between competition authorities. The present proposal is based on the premise that national competition authorities will apply Articles 81 and 82 in accordance with their respective national procedural rules. It is not necessary for the implementation of the reform to embark on a full-scale harmonisation of national procedural laws. On the other hand, it is necessary to regulate at Community level a limited number of issues that have a direct impact on the proper functioning of the proposed system.

First and foremost, it is necessary to oblige the Member States to empower their national competition authorities to apply Articles 81 and 82.
It is also necessary to stipulate the content of the decisions that national competition authorities may adopt in the application of Articles 81 and 82 (see Article 5 of the proposed Regulation), in order to ensure a full and effective

implementation of the directly applicable exception system. No competition authority forming part of the network can be empowered to adopt constitutive exemption decisions when applying the Community competition rules.
Article 13 of the proposed Regulation empowers national competition authorities and the Commission to suspend or terminate proceedings on the ground that another member of the network is or has been dealing with the case; this is necessary to ensure an efficient allocation of cases and use of resources within the network. It is, however, neither necessary nor appropriate to oblige other competition authorities to suspend or terminate their proceedings. It is the task of the network to ensure in practice that resources are used efficiently.

The proposed Regulation provides a legal basis for the exchange of information and assistance between national competition authorities. Such horizontal cooperation is necessary in order to enable them to apply Articles 81 and 82 effectively. The power of the Commission to make written and oral submissions in the Community public interest before national courts hearing a case on the application of Articles 81 and 82 (see Article 15) is necessary in order to allow the Commission to contribute to their consistent application. Divergent application of Community competition law by national courts would pose a threat to the proper functioning of the single market and the coherence of the system. In accordance with the principle of subsidiarity it is proposed that the power to make submissions before the courts be shared between the Commission and the national competition authorities. Furthermore, submissions will be made in accordance with the procedural rules in force in the Member State in question. Thus, the proposal does not purport to harmonise national procedural law, except that it grants the Commission and the national competition authorities the power to make submissions on their own initiative. In order to enable the Commission and the national competition authorities to exercise this proposed new power effectively, it is necessary to oblige national courts to furnish, upon request, relevant information pertaining to cases before them in which the Commission or a national competition authority is considering making a written or oral submission or has decided to do so. ■

United Airlines / US Air

The Commission has authorised UAL Corporation, whose principal operating subsidiary is United Airlines Inc, to acquire US Airways Group Inc. The Commission's review showed that the operation could raise competition concerns on four transatlantic routes (Frankfurt-Philadelphia, Charlotte and Pittsburgh and Munich-Philadelphia). But United submitted undertakings in the form of slot divestitures at Frankfurt and Munich which will facilitate the entry of new competitors on those routes. United Airlines Inc and US Airways Group Inc (US Air) are both based in the United States. Their main area of operation is the United States; however, both airlines also operate flights between Europe and the United States, hence the regulatory review by the Commission of the European Union. (Source: Commission Statement IP/01/48, dated 15 January 2001.)

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