

GUEST EDITORIAL: CHANGE OF POLICY IN EUROPEAN COMPETITION LAW? *

“Hear, for I will speak noble things, and from my lips will come what is right” (Book of Proverbs, chap. 8, v. 6). Unfortunately, this pious saying does not apply to the European Commission’s White Paper on the modernization of the competition rules.

1. The proposals made by the Commission are quite complex, but in essence consist of the following: the current system of prohibition with administrative authorization will be converted into a directly applicable system of exceptions. Paragraphs 1 and 3 of Article 81 will be read as an integrated whole.

2. The discussion is made more difficult by the fact that the Commission’s goals are not very clear, or at least are fluctuating.

(i) It was said first that the limited resources in Brussels should be used more efficiently. However, this is not a convincing explanation, for a number of reasons:

- each year, the Competition Directorate-General has settled about as many cases as were brought to Brussels. Only a total of 1,200 unresolved cases have piled up at the Commission. To settle all these cases would require one single concerted effort, not a change in the system;
- the number of individual exemption notifications will be reduced dramatically with changes to the substantive law and new block exemption regulations for vertical restraints of competition and rationalization agreements, as well as for co-operation in research and development;
- the Commission has not made an effort to examine the lack of efficiency in its internal working process. Insiders have described the situation, with its seven hierarchies, as “kafkaesque”. The Competition Directorate-General should explain why its merger task force has done a marvellous job, while the staff combatting anti-competitive behaviour have been frustrated in carrying out their tasks. The German Federal Cartel Office has used a system of prior notification for 42 years now without a trace of a problem.

At the same time, it is clear that arguments based on an alleged work overload are not intended seriously. Alexander Schaub, head of the Competition Directorate-General, stated at a hearing of the Committee on Economic

* The reader is also referred to the full-length article on the Competition White Paper by Ehlermann, in this Review. The Editors thus present two quite divergent views in the lively debate engendered by the White Paper.

and Monetary Affairs of the European Parliament that, also bearing in mind the forthcoming accessions of the new candidate Member States, even if the personnel in Brussels were doubled, the Commission would adhere to the proposals in the White Paper.

(ii) A second set of objectives mentioned concerned the need to wage a more effective fight against so-called hard-core cartels. Yet, agreements verging on the criminal have nothing to do with a notification system. These agreements will never be notified under any system in which cartels are scrutinized. They remain unaffected by the Commission's proposals, which are more related to the vast range of cases whose antitrust appraisal appears doubtful.

(iii) Finally, it was said that the inefficiency of the current notification system is demonstrated by the fact that formal prohibitions are only issued in isolated cases. This argument is based on false reasoning. The opposite is true. No formal prohibitions are needed due to the very fact that the notification system is working. Recently, this became very clear from the Dutch Cartel Act, which came into force on 1 January 1998. The new Dutch cartel office was confronted with more than 1,000 notifications within the first three months. It settled them in an informal manner. According to the head of the Dutch cartel office, mere "raised eyebrows" often sufficed. Here, it would be ridiculous to conclude from a lack of formal decisions that the system was inefficient.

In substance, the Commission is proposing a change of cartel policy. An *ex ante* control through notification will be replaced with an *ex post* control through deterrence. At the same time, the prohibition on cartels will tend to be limited to undertakings with a certain market power. An approach that was too legalistic in the past will be replaced with a stronger economic perspective. This will be based on the assumption that most instances of co-operation between competitors are to be considered as beneficial. (Note: there is in any case a fundamental difference between agreements between competitors on the one hand (horizontal agreements) and agreements between undertakings acting at different levels of a market (vertical agreements)).

3. For competition policy, such a change is extremely risky.

(i) A system of directly applicable exceptions is clearly inferior to a prior notification system, again for a number of reasons.

- The cartel offices do not receive any information.
- It leads to a complete lack of transparency for interested third parties, competitors, subcontractors, and customers, including consumers.
- Self-assessment by the undertakings and their respective attorneys cannot guarantee the public interest in the protection of competition. There are three reasons for this. First, undertakings often lack the necessary data concerning the market. It is simply asking too much to ask them to apply Article 81(3) EC. Potential sinners are invited to exonerate themselves. This can hardly be described as a happy arrangement.

Second, in contrast, a notification system has many advantages. Such a system gives the cartel office the opportunity to work actively towards an arrangement that is in conformity with competition principles before horizontal agreements take effect. This exercises discipline on the parties to a cartel. They will prefer to conclude contracts that conform with competition law, so as to be granted an exemption. The incentive to change from a permitted co-operation over to a prohibited one is reduced, since the undertakings are aware that the competition authority “knows”. Thirdly, moreover, notifications give the opportunity to grant exemptions in well-measured doses; they lead to a concentration of exemption decisions in specialized offices which possess the appropriate experience and expertise.

These are not mere assertions. These statements are born out by extensive historical and comparative experience.

(ii) Legal certainty for undertakings cannot be established sufficiently with a system of directly applicable exceptions. A statement from a competent authority, even if only an informal one, is for undertakings quite different from the legal opinion of a practising lawyer. In this context, it has to be emphasized that the difficulties that arise in the application of competition law are not really normative in nature, but are factual. Each case is different. Therefore, assistance in the form of guidelines and the like which the Commission has promised ignore reality.

(iii) The coherence of application of law in Europe will become problematic. A distinction can be made. At the level of co-operation between the national cartel offices, including the Commission in Brussels, the prognosis is positive. Here, coherence can be achieved. The same will not hold true for the administration of justice in civil law courts from Palermo to Helsinki and Lisbon to, soon, Warsaw. Under a directly applicable exception system, each court concerned would have to apply Article 81(3) EC on its own responsibility. The private parties would be “masters of the proceedings”. There will be no ex officio clarification of the facts. There will be no preceding decision by a cartel office. This can only lead to chaos or – more realistically – to inactivity.

(iv) The Commission has stressed subsidiarity and decentralization in the application of the law. However, this is more apparent than real, since the Commission reserves a right of evocation. It is able to remove any proceeding from not only the national cartel authorities, but also from the national courts. In the case of the latter, this holds true as long as a case has not been formally closed (*res iudicata*). And the legal effect would be binding only *inter partes*, not *erga omnes*. Ultimately, the organs of the Member States mutate into auxiliaries of the Commission. The latter makes decisions at its own discretion in a relaxed atmosphere. The White Paper describes what administrative agencies dream of. In this context, two things are to be considered:

- the knock-on effect of European competition rules, to the detriment of national cartel laws, could increase dramatically within the new system;
- legal protection at the European level is very limited in comparison with national proceedings: European courts follow the French tradition of administrative jurisdiction and therefore review decisions of the Commission in a very limited manner.

4. It must be conceded that a system of ex post control via deterrence can be effective. The experience of U.S. antitrust law demonstrates this. However, given the division between a per se rule on the one hand and the rule of reason on the other, U.S. antitrust law has a completely different character from the planned E.C. system. In the latter, all currently prohibited restraints on competition could in principle be admissible. When American antitrust law explicitly allows restraints on competition by means of exceptions, it assumes as a matter of course a notification system, for example in the Webb-Pomerene Act.

Furthermore, a system of ex post control requires a wealth of flanking rules which do not exist in Europe.

- Civil prosecution of cartel offences requires the possibility of a pre-trial discovery procedure.
- Contingent fees create an incentive for legal prosecution. In Europe, contingent fees are, to a wide extent, considered contrary to public policy.
- Treble damages provide an additional incentive. However, American decisions which include punitive damages are generally not recognized in Europe. Here, punitive damages are against the *ordre public*.
- The disadvantages of American antitrust enforcement should not be overlooked. The legal uncertainties are numerous. According to a well-known saying, the spirit of Senator Sherman sits on the board of every American corporation. However, this only advances the financial interests of the lawyers. Moreover, civil procedures can be used in the USA as instruments of intimidation (another restraint on competition). A defendant who is taken to court wrongfully is left with his or her own costs, in the form of immense lawyers' fees. This almost forces the parties to reach an arrangement.
- Finally, the question must be asked whether governments and public opinion in Europe will accept the negative effects of workable competition with the same equanimity one finds in the U.S. Considering the numerous violations of European State aids rules, the pains to cultivate national champions, the far-reaching acceptance of notions of "public service" in European countries, one may have doubts. The main threat to competition still comes more from the European States than from private undertakings.

5. The Commission wants to institute a change to the system by simply amending Regulation No. 17. It is claimed that this does not conflict with primary Community law, since Article 81 EC leaves the issue of a notification

system or a directly applicable exception system open. This is a myth. The different points of view held in 1957 were plastered over by a compromise, in much the same way as that occurred in other parts of the E.C. Treaty. In this case, however, the issue was not left undecided, but was settled, and must be determined using the usual methods of interpretation. A wealth of arguments indicate that such a change is not possible without a change in primary Community law.¹ In the event that Brussels adheres to its position and the European courts sanction its view, a constitutional conflict could arise if the German Constitutional Court for its part were to recognize the need for a Treaty amendment. According to the case law of the highest German court, European law is solely made effective by means of the national Ratification Law. However, the Ratification Law does not cover changes to primary Community law. The latter would be null and void in Germany, in that case. Following the Maastricht I judgment, the issue whether a change to primary community law has occurred or not is ultimately the responsibility of German courts to decide. I myself am no fan of this case law. Nonetheless, it is binding on every State authority in Germany.

6. There are a wealth of proposals leading to an increase in the efficiency of the European competition rules, but which nevertheless adhere to a system of prior notification. The easiest way would be for the Commission to delegate the application of Article 81(3) EC to the national cartel offices. This would be a kind of instructed administration. The Commission's control and authority to issue instructions would be guaranteed. This would coincide with the Commission's proposals insofar as a co-operative network between Brussels and the national cartel offices should be established in any case.

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1. See also, Monopolkommission, *Cartel policy change in the European Union? On the European Commission's White Paper of 28 April 1999*. Special report by the German Monopoly's Commission pursuant to section 44, para. 1 of the Act Against Restraints of Competition (GWB) (Nomos-Verlagsgesellschaft, Baden-Baden, 2000).

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