Legal Issues of Economic Integration 32(2): 105–109, 2005.

European Competition Law Revisited: The 'Great Overhaul' of 2004 Analysed

From the Board

This Editorial is written to draw your attention to yet another volume of Legal Issues dedicated entirely to the recent, though stormy developments, in the European Competition Law area. Readers may remember that we informed them of discussions on the reform/modernisation of EU anti-trust law a couple of years ago, publishing a series of fine contributions on the issue by Eleanor Fox, Ian Forrester, Petros Mavroidis and Damien Neven.[1] Since then, many of the amendments proposed have become final, and even more changes have emerged. As of May 1st 2004, a completely new Regulation 1/2003 effectively replaced the original procedural Regulation 17/62.[2] Furthermore, on that date, a completely overhauled merger control regulation came into force, Regulation 139/2004.[3]

The direct result has *inter alia* been that the ten new Member States and their business communities were faced with the new and modern European competition rules right from the day of their accession to the EU and without any form of transitional provisions applying to them. This complete overhaul of European Competition Law, generally referred to as the 'modernisation' thereof, is probably the most important legacy of the former Commissioner responsible for competition, Prof. Mario Monti. As of November 1st 2004, there now is the new Commissioner, Neelie Kroes, who will have to work with these new rules and has to show that these are really adapted to the more economic approach in anti-trust enforcement as has been emphasised by the Commission right from the start of the reform efforts back in 1998.

As for the coming into force of Regulation 1/2003, it may be remembered that the main feature of the proposed change was the turning of the entire Article 81 of the EC Treaty into a fully and directly applicable provision. The immediate result of this was that the notification system that was hitherto in force in the EU would be abolished, and that the Commission was no longer to issue decisions in which practices notified would get an official green light. On the contrary, under the new *'directly applicable exception system',* the parties would now have to rely entirely on their self-assessment, whereas no official

1. Legal Issues of Economic Integration, Vol. 28, 2001–2.
2. Regulation 1/2003 implementing Articles 81 and 82 EC, [2003] OJ L 1/1.
3. Regulation 139/2004 on the control of concentrations between undertakings (EC Merger Control Regulation, ECMR), [2004] OJ L 24/1.

declaration as to the validity of these agreements would be forthcoming from any competition authority, be it the Commission or a national Competition Authority of one or the other Member State. All of this is contrary to what the wording of Article 81(3) ECT might suggest.[4]

At the same time, further amendments to the old system were introduced, such as the tightening of the investigatory and fining powers of the Commission. Moreover, the introduction of the sharing of powers to enforce the Articles 81 and 82 ECT between the Commission and the national Competition Authorities constitutes a true attempt to apply the principle of subsidiarity to this field of the law as well. This sharing of powers implied putting into place a close form of enforcing cooperation between the Commission, on the one hand, and the National Authorities, on the other. A *'Network'* of European enforcing institutions was set up, and rules on the cooperation within the Network have been defined.[5]

Moreover, the new system implies that nowadays the national commercial courts in all present Member States in the enlarged EU have the power to directly apply the exception, as contained in Article 81(3), in commercial disputes brought before them that might include a dispute as to the application of the prohibition set out in Article 81(1) ECT. Unlike in the US, for the national courts in Europe, this is a new power, with which they are yet to become acquainted. It implies complex economic analyses and a thorough understanding of the competition policy of the EU in many respects, above all in the context of complicated cooperative agreements between competitors.[6] Accepting that this might be a problem, the Commission issued a Notice to give these national judges some guidance, so that they also would be able to function within the triangle of modern European anti-trust enforcers: i.e. the Commission, National Competition Authorities and national courts.[7]

In this volume of Legal Issues, you will find some fine contributions by practitioners, academics and officials from within the Commission, each commenting on these developments from their own perspective and analysing the changes. It is thus shown that the coming into force of the new rules by no means suggests that the debate on all this will be closed. On the contrary, it shows that there still is room for further improvement, so to speak for *'fine-*

4. The core aspects of this important change in the rules has been further explained by the Commission in: Guidelines on the effect on trade concept contained in the Articles 81 and 82 of the EC Treaty, [2004] OJ C 101/81; and Guidelines on the application of Article 81(3) of the Treaty, [2004] OJ C 101/97.
5. Commission Notice on the cooperation with the Network of Competition Authorities, [2004] OJ C 101/43.
6. Cf. also F.O.W. Vogelaar, 'Horizontal Agreements and Modernisation' in HWWA/Intereconomics-Review of European Economic Policy, Vol. 37 No. 1, pp. 19–28.
7. Notice on the cooperation between the Commission and the Courts of the EU Member States, [2004] OJ C 101/54.

tuning', and that we have to keep an open eye for improvement. Jacques Bourgeois analyses the new substantive rules, as elaborated upon by the Commission in their two sets of guidelines, i.e. the one on Article 81(3) and the other on the concept of 'trade between Member States'. Phedon Nicolaides has a look at these documents from an economic point of view and criticises the cohesion with the past decision practice of the Commission. James Venit looks at the new rules from a practitioners' point of view having worked in Brussels with the old rules for many years and comes up with some interesting comments. And last, the Network is explained and commented upon by Dekeijzer and De Smijter, who within the European Commission, are responsible for the coordination of the Network's operations and activities, whereas René Smits deals with the delicate issue of exchanging information between the Authorities within the Network, once this information is obtained in the process of enforcing the rules. Things can get particularly complicated for companies relying on one of the Member States' leniency programmes (possibly leading to immunity from fines), where the information given might be shared with Competition Authorities in other Member States with more strict enforcement rules or even enforcement by criminal sanctions. Also, applying for leniency with the Commission or with one Member State does not automatically mean that the company making such application has secured immunity from fines or other sanctions throughout the Community.

Also, it might be mentioned here that several EU Member States are now contemplating the provision of (quasi-)criminal law sanctions for anti-trust infringements to be imposed on private individuals in addition to the traditional administrative law sanctions (limited fines and periodic penalties) already in existence for the 'infringing' companies. Some of the Member States have incorporated personal sanctions for those who actually led their companies or company divisions to infringe the law, and these persons may now incur fines, might be barred from certain leading positions in companies[8] for a period of time or even may risk jail sentences. Even where national legislation would call these sanctions to be of an 'administrative law' nature, the ECHR case law would go in the direction of thinking of them as 'criminal law' by nature. By the time this volume of Legal Issues will have landed on your desk, the Amsterdam Center for Law and Economics, ACLE, will have held a two-day conference on this issue and a publication of the full proceedings of that conference will be on the market later this year.

Now that Article 81 has become directly applicable in its entirety, the expectation may be justified that civil enforcement might start to play a somewhat more prominent role as far as claiming of damages for infringements of the European competition rules is concerned. In this context, it is worthwhile mentioning that, as from September 2004, the Commission has posted on

8. The so-called 'disqualification orders' as nowadays can be imposed in the United Kingdom.

their DG Competition website the report written at the Commission's request by Denis Waelbroeck on the important issue of claiming damages for breach of the competition rules in civil law suits. Together with that report, the reading of which is highly recommendable, there are also the national reports written by seasoned practitioners of each Member State on the case history as well as on certain aspects of civil enforcement of the competition rules in their respective jurisdictions. The vast body of documentation so offered may prove to be a fruitful source of further study and analysis.

In the field of Merger Control, a slightly more quiet, though not less interesting, revolution took place. The new Regulation 139/2004 in essence brought us two main new features as well as a few smaller more technical ones. In the first place, the substantive merger control test was amended to now become the *'Significant Impediment of Effective Competition'*-test (*SIEC*-test). As was explained by the Commission, this test is thought to give the enforcers more room to deal with mergers that have undesired side-effects on effective competitive market conditions as a result of the non-coordinated behaviour of all market players concerned, especially in an oligopolistic market. Further thoughts on this issue are offered by the Commission in their new Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentration between undertakings as published early 2004.[9] In the second place, the new regulation aims at improving the complicated situation that may arise when a concentration does not reach 'Community Dimension' and, for that reason, may have to be notified to national competition authorities in a multitude of Member States. This might trigger unnecessary delays, high transaction costs and legal uncertainty. A fine grid of potential case referrals to and from the Member States is now put in place in which not only the Commission and the national Competition Authorities play a role, but where the parties concerned in the transaction may take the initiative and may actively request referral of their concentration to the Commission or to one or the other Member State, as the case may be.[10] These new mechanisms put in place may help to contribute to the preservation or enhancement of the *one-stop-shop*-principle that generally should prevail in EC merger control. Further technical amendments have been inserted *inter alia* concerning the possibilities for somewhat extended deadlines in case of discussions around commitments offered by the parties to remedy the Commission's specific concerns in a particular case. *'Stop-the-clock'* or relatively short *'time-out'* arrangements are new to the operation of EC merger control and should be welcomed as a useful addition to the procedural possibilities.

Gerwin van Gerven and Jules Theeuwes have described and analysed these

9. [2004] OJ C 31/5.
10. Cf. the Articles 4(4), 4(5), 9 and 22 of Regulation 139/2004 relevant to the issue of 'multiple filing'.

novelties in the merger control rules from a legal and economic perspective. Also their contributions show that we may not have seen the end of the discussion and that European competition law will remain very much on the move in the time to come.

To conclude this special volume of Legal Issues, Jacques Steenbergen has analysed the effect of all these developments in the context of the international antitrust scene. He comes to the conclusion that these developments are certainly contributing to bringing about more cohesion in the enforcement of free competition in an open market economy in the major economic blocks of the world. If that is true, the EU's recent major overhaul of its competition rules will have served a very good purpose apart from any Community internal positive effects that it may have.

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