Reform of EC Competition Policy: A Significant but Risky Project[1]

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Abstract

The regulation that applies the anti-trust provisions of the EC Treaty was adopted in 1962. Since then, it has been largely left unchanged. This regulation confers to the European Commission the exclusive right to exempt agreements between companies from the prohibition contained in the anti-trust rules. The regulation will soon be repealed. If member states agree, its place will be taken by a new regulation that will allow national competition authorities and national courts to exempt agreements between companies. Since this new system of competition enforcement has never before been tried in the EU, it is not clear how it will affect companies and their operations and how national authorities and courts will work together to ensure effective enforcement of competition rules. This article examines the main provisions of the proposed new regulation and considers their likely impact on the effectiveness of competition enforcement in an enlarged European Union.

The significance of the proposed reform of competition policy[3]

Consider the following questions:

Which policy applies to all sectors of the economy? Which policy has extra-territorial application and may penalise companies based in countries far away from the European Union? In which policy can the European Commission enter and search the premises of any company anywhere in the EU and eventually impose fines on them of up to 10% of their world-wide turnover? In which policy does the EC Treaty empower the Commission to issue decisions or directives to member states without prior approval of the Council or Parliament? In which policy must the member states ask for authorisation by the Commission before implementing national measures? In which policy does the Commission have to deal with more than 1,300 cases per year? Which policy is enforced directly by the Commission? Which policy is enforced with an implementing regulation that dates back to the very early years of the Community and has not changed yet?

The common answer to all these questions is "competition policy". This policy, whose objectives and enforcement procedures have remained virtually unchanged since the inception of the European Community, is now being modernised and decentralised. The Commission has proposed a new Regulation[4] for the application of Articles 81 & 82 of the Treaty to replace the old Regulation 17/62.

The proposed Regulation is significant for several reasons:

(a) For the first time in the history of the EC, it empowers national authorities, including national courts, to apply the anti-trust exemption in Article 81(3) together with the prohibitions in Articles 81(1) & 82. Granting exemptions has always been the prerogative of the Commission.
(b) For the first time, national authorities are required to apply Community law instead of national law whenever cross-border trade is affected.
(c) For the first time, national authorities are required to consult the Commission before making any decisions.
(d) For the first time, national courts have to submit copies of their rulings to the Commission.
(e) The Commission will have the right to appear before national courts.
(f) And, the 40-year "prior notification" regime will end. Under the current Regulation 17/62, companies that want to benefit from the exception in Article 81(3) must first notify their agreements with other companies to the Commission for approval. Otherwise, if these agreements are found to contravene Article 81(1), they are automatically null and void.

Why is reform necessary?

Although the market economy is believed to rely on "individualistic competition" it is in fact founded on an elaborate network of agreements between companies, their suppliers, distributors and customers. These agreements are useful only if they are enforceable in courts of law. Legally binding agreements are, therefore, the bedrock of modern economy.

Yet, almost any agreement between companies may fall foul of the competition rules of the EC Treaty. This Article bans all agreements that restrict competition and affect cross-border trade in the Community. Since, by definition, an agreement does restrict the freedom of action of the parties involved, many corporate

agreements fall within the scope of the prohibition of Article 81(1).

Because the Community system of competition imposes a blanket ban on restrictive agreements, it also provides for an exception of those agreements that either do not distort competition or whatever distortions they may cause are outweighed by their beneficial effects. This arrangement is embodied in the principle of "exemption by authorisation". In effect, companies must notify their agreements to the Commission and ask for exemption even when it is obvious that they do not cause any distortions to competition.

The European Commission will soon lose its exclusive right to exempt agreements between companies from the anti-trust prohibitions

This system suffers from a number of structural weaknesses:

(a) Notifications do not catch "hard-core"[5] cartels (apparently only nine prohibitions have resulted from notifications without any subsequent complaint).[6]
(b) National authorities are prevented from granting exemptions, resulting in heavier workload for the Commission. This state of affairs is not sustainable after enlargement of the EU.
(c) Having to process notifications distracts the Commission from its real task of uncovering and prosecuting hard-core cartels.
(d) Business bears excessive compliance costs.
(e) Agreements that fall within Article 81(1) are not legally secure or enforceable in a court of law unless first notified to the Commission.
(f) Yet, due to excessive workload generated by the many notifications, the Commission issues only informal (administrative) "comfort" letters[7] whose legality in national courts is a matter of dispute.

With respect to the usefulness of the notification system, it has been argued by its proponents (mostly business representatives) that its main purpose is not to catch cartels but to provide a "service" to business. Although they also acknowledge that the law advances mostly through "negative" (i.e. prohibitive) decisions which interpret the prohibitions in Articles 81 and 82 and through the various guidelines and explanatory notices, they also believe that notifications offer to the Commission an important picture of the types of agreements concluded among undertakings and enable it to draw implications about clarifications on competition policy that may be necessary. This, they argue, facilitates a pro-active role in enforcement on the part of the Commission.

It seems that the issue is not how or whether to relieve the Commission by shifting the burden of enforcement to national competition authorities. After all, for the Community as a whole, it makes little difference whether Community or national resources are expended in enforcement. The real issue is whether such re-allocation of tasks will raise the efficiency of enforcement by either enabling the Commission to catch more cartels or empowering national authorities to do a better job. It is not obvious how the draft Regulation contributes towards these two goals.[8]

In addition, it has been argued that the notification system has grown to such, unmanageable[9], extent because the Commission has interpreted very widely the prohibition of Article 81(1). Exemptions and "negative clearance"[10] are sought by business because almost everything is illegal. If the Commission had given more weight to the economic effects of agreements, there would be less need for notifications. Yet it would have been very difficult to enforce competition policy on the basis of such a "rule of reason" at the initial stages of the Community when there was little experience with competition policy and the concepts of competition in the Treaty were yet underdeveloped.

Aims, means and expected results of reform

The proposed reform primarily seeks to:

(a) create a "directly applicable exception system" where no prior authorisation by the Commission is necessary;
(b) apportion the responsibility of enforcement of Articles 81(1) and 82 and assessment of the applicability of Article 81(3) between the Commission and national authorities, with much of the enforcement being undertaken by national authorities while the Commission concentrates on major, multi-country, infringements and policy development.

These aims are to be achieved by multiple means. The main instruments of reform are:

(a) amendment of implementing regulations (Regulation 17/62 and the various regulations applying competition rules to transport);
(b) introduction of a new rule about the conditions under which EC law and national laws are applicable (EC law is to be applied whenever cross-border or intra-Community trade is affected);
(c) establishment of new cooperation procedures between the Commission and national authorities (information exchange, sharing of responsibility and tasks, consultation).

If the proposed Regulation is approved, the regulatory environment for business should improve. There should be less bureaucracy, more efficient use of public resources and fewer distortions of competition, which hurt both companies and consumers alike. More

specifically, benefits will be realised from:

(a) a larger number of enforcers of EC competition law;
(b) a more efficient use of Commission resources;
(c) an increase in the powers of investigation of the Commission [it has asked for powers to search the homes of business executives];
(d) a levelled playing-field brought about by application of EC law to more cases; less parallel application of national and EC law; clearer delineation of tasks between national authorities;
(e) no submission of notifications to the Commission and therefore less bureaucratic procedures to be complied with by business;
(f) higher certainty for business in contractual relations.

However, as mentioned earlier, the new policy which is outlined in the draft Regulation also has a downside. The next section examines the most serious drawbacks of the reform in relation to the main provisions of the draft Regulation.

The risks of the reform in relation to the main provisions of the proposed new Regulation

Article 1: Direct applicability: *Practices*[11] *caught by Article 81(1), which do not satisfy Article 81(3), and Article 82, are prohibited.*[12]

This is one of the most important innovations introduced by the draft Regulation. In addition to Articles 81(1) & 82, Article 81(3) is now also directly applicable. This means that Article 81(1) must be considered in conjunction with Article 81(3). Since prior notification will not be required, it is up to undertakings themselves to assess, first, whether their agreements generate the positive effects mentioned in Article 81(3), second, whether those positive effects are sufficient to justify application of Article 81(3) and, third, that their agreements do not retain any hard-core practices that are always prohibited.

There is concern that legal uncertainty will increase rather than decrease because undertakings will not be able to obtain either a formal exemption or a negative clearance. This is because no one will know for certain whether their agreements are truly compatible with the EC rules of competition until someone complains or takes them to court and loses the case.

Article 3: Relationship between Articles 81 & 82 and national competition laws: Where a practice infringing Article 81 or Article 82 may affect trade between Member States, Community competition law applies to the exclusion of national competition laws.

Since it is relatively easy to prove that cross-border trade is affected, most competition authorities will in reality apply EC law. Parallel application of EC and national law will be rare.

An issue that has been raised by some commentators is that this Article appears to preclude application of national laws with more restrictive provisions than EC law. The question is how likely that is in practice.

Another criticism that has been made, is that this Article refers to trade effects with no mention of restriction of competition. It has been argued that this would prevent national law from applying in those situations where Community law would be inapplicable because of no restriction of competition. However, it seems to me that this is an unfounded argument. If there is no restriction of competition then Article 81 would not apply. With respect to Article 82, there is no reference to restriction of competition because abuse of dominance is a distortion of competition. Therefore, if Article 81 is inapplicable because not all of its conditions are satisfied, then national law would apply, while for Article 82 what matters is the existence or not of abuse of dominance.

A point that has not been made by other commentators is that national authorities may also have to apply competition rules to undertakings which have special or exclusive rights conferred to them by the state. In comparable situations, the Commission would also apply Article 86(1) in conjunction with Article 81 or Article 82 to the actions of member states. What will happen, however, when an undertaking claims that its actions are justified under Article 86(2)? In the case-law it is recognised that the assessment needed under Article 86(2) is a task for the Commission. But the case-law refers to the tasks of the Commission as opposed to the tasks of the member states. Does it prevent national competition authorities from acting on their own initiative?

Article 5: Powers of the competition authorities of the Member States: The competition authorities of the Member States shall have the power in individual cases to apply the prohibition in Article 81(1), where the conditions of Article 81(3) are not fulfilled, and the prohibition in Article 82. Where the conditions for prohibition are not met, they may decide not to take action.

This is one of the most significant provisions of the draft Regulation. National authorities may not grant exemptions, as can the Commission at present. But they may refrain from prohibiting an agreement under Article 81(1) if Article 81(3) applies. The decisions of the national authorities will be binding only in their own territory. It is hoped that there will be no "competition among national systems of rules".

Companies fear that the Community will become a less predictable place in which to do business

When the Commission first unveiled its ideas in a White Paper, there was concern about "forum shopping" – that firms would petition the national authority which would be perceived to be the most favourably predisposed towards their case. The fact that decisions will be valid only in the territory of each authority and that they will be able to enforce the prohibitive part of Article 81 (rather than

grant exemptions) have dispelled fears about a "race to the bottom", where the norms of the least strict authority would prevail across the EU. However, there is still concern that undertakings will be exposed to multiple jeopardy, that costs of defence and prosecution will rise and that the law will not be applied homogeneously, as some authorities decide to ban a practice while others decide otherwise.

The future enforcement of competition rules will have to rely on close cooperation between national authorities and the European Commission

Indeed, the same practice may be subject to decisions by more than one authority. A defendant may end up being involved in multiple suits in several member states. This will increase costs. By implication, a plaintiff may have to lodge proceedings in several member states to bring an end to a practice across the EU. A possibility that cannot be completely discounted is that firms that want decisions to have EU-wide coverage may still have to complain to the Commission. As a result, the workload of the Commission may not be lightened as much as it hopes.

Article 6: Powers of the national courts: *National courts before which the prohibition in Article 81(1) is invoked shall also have jurisdiction to apply Article 81(3).*

Some observers have voiced a concern that through the exercise of the economic judgement which is necessary for the application of the full Article 81, the application of EC law will diverge across the EU.

It has also been questioned whether the courts have the requisite knowledge to carry out the economic balancing act required by Article 81(3). There are two answers to this question. First, the plaintiffs will assist the courts with arguments and analysis. Second, the Commission does not really carry out a proper economic cost-benefit test, balancing costs of reduction of competition against the potential benefits of cooperation. In effect it examines whether Article 81(1) applies, then considers whether the conditions of Article 81(3) are met and then declares Article 81(1) inapplicable. The occasions where conditions are attached to a decision so as to reduce the negative effects of an agreement are rare.

Article 11: Cooperation between the Commission and the competition authorities of the Member States: *The Commission and national competition authorities shall apply the Community competition rules in close cooperation. The Commission shall transmit to competition authorities copies of the most important documents relating to its intended decisions. National authorities shall inform the Commission accordingly at the outset of their own proceedings. Where competition authorities intend to adopt a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption regulation, they shall first consult the Commission. No later than one month before adopting the decision, they shall provide the Commission with a summary of the case and with copies of the most important documents. At the Commission's request, they shall provide it with a copy of any other document relating to the case. They may also consult the Commission on any other case involving application of Community law. The initiation by the Commission of proceedings shall relieve competition authorities of their competence to apply Articles 81 and 82.*

Consultation may reduce the possibility of uneven enforcement and prevent a race to the bottom. However, national authorities cannot be forced to take action by opening investigations. Under Article 5, national authorities may only take negative decisions (i.e. finding of infringement). Since they cannot grant exemption when the conditions of Article 81(3) apply, they will simply have to decide that there are no grounds for action on their part (i.e. reject complaints). In these cases they are not required to consult the Commission. Will the act of informing the Commission of initiation of proceedings be enough in cases where national authorities decide there are no grounds for further action? More broadly, will summaries of cases suffice when the issue at hand, for example, is the method of collection of data?

When the Commission disagrees with a national authority it will be able to withdraw the case from that authority. This means that in a system of 16 enforcement authorities (or 29 [=15+1+13] in the near future), the Commission's view will prevail and will stifle experimentation and innovation by the authorities best placed to assess the impact of competition law and anti-competitive practices.

Article 13: Suspension or termination of proceedings: *Where competition authorities of two or more Member States are acting against the same practice, the fact that one authority is dealing with the case shall be sufficient grounds for the others to suspend the proceedings before them or to reject the complaint. The Commission may likewise reject a complaint. Where national competition authorities or the Commission receive a complaint against a practice which has already been dealt by another authority, it may reject it.*

It has been argued that since there is no stipulation of mandatory suspension of proceedings or rejection of complaints, undertakings will be exposed to the risk of both multiple simultaneous proceedings and sequential proceedings. But even if the wording of Article 13 is interpreted to mean an unequivocal requirement for suspension of proceedings, the same cannot be said for rejection of complaints. Moreover, the requirement for suspension refers to simultaneous cases. National

authorities may re-open old cases on their own initiative.

These possibilities have led some commentators to the conclusion that there will be a tendency towards stricter enforcement (since national authorities will be able to issue only negative decisions) with a disintegrating effect on the internal market. While it is true that national authorities will be able mostly to enforce prohibitions, it is not clear why they will tend to focus on the negative effects on their markets and ignore the positive effects in other markets. If they apply EC law they will have to consider the totality of the effects across the EU. More importantly, the defendants will point them out. It is also worth noting that in this case, EC practice favours defendants because it is mostly sufficient to identify any non-insignificant positive effects of cooperation in order to secure inapplicability of Article 81(1) (provided the cooperation in question does not contain hard-core restrictions).

Article 16: Uniform application of Community competition law: *National courts and competition authorities shall use every effort to avoid any decision that conflicts with decisions adopted by the Commission.*

Uniform application of EC law also depends on an important group of "outsiders": the corporate lawyers and the academics. They learn and keep themselves up to date by reading and analysing Commission decisions and rulings of the EU courts. In a decentralised system where most decisions will be taken by national authorities and courts, it is not clear how they can maintain access to decisions and rulings across the various member states. The lawyers and the academics also contribute to the development of competition policy through their research and writings. If they do not have access to the various national decisions to compare and evaluate, policy development and adjustment may also suffer.

In the future, EU courts will be able to rule on competition issues not in the context of appeals against Commission decisions [the most frequent way by which the courts expound on competition] but through requests for preliminary rulings from national courts. One wonders, in this respect, how effective the preliminary rulings will be in shedding light on broad issues of competition that cut across member states.

Concluding remarks

There is no doubt that the reform is significant and that it will have a non-negligible effect on business and national competition authorities. What is not certain is whether the positive effects of the reform will outweigh the negative ones. Companies fear that the Community will become a less predictable place in which to do business. They will not be able to obtain exemptions from the Commission while they will be vulnerable to actions by 16 different authorities. Even though the substantive rules will be the same, companies will still have to cope with up to 16 different sets of procedural law. Not surprisingly, some companies and many corporate lawyers would prefer the existing Community system.

Whether indeed the legal environment in which companies operate will become less predictable will very much depend on the actions of national competition authorities and on the extent and quality of cooperation among these authorities and between them and the Commission. The precise form and procedures of cooperation are not yet known. The only thing which is certain at this point in time is that the final chapter on the reform will be written much after the proposed Regulation is adopted by the Council.

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NOTES

[1] This article continues the analysis of the proposed reform of competition policy that appeared in *Eipascope*, 2001, No. 2, pp. 16-22. My colleagues Peter Goldschmidt and Christoph Lanz, in their article "Maybe Definitely – Definitely Maybe", examined the proposals from a legal perspective. The present article considers the necessity of the reform and the expected benefits together with the risks involved for businesses and enforcement authorities.

[2] Professor, European Institute of Public Administration. I am indebted to Christoph Demmke and Veerle Deckmyn for comments and suggestions on an earlier version. I am solely responsible for the contents of this article.

[3] This article draws on a conference that was held at EIPA in December 2001 to examine the merits of reform of EC competition policy. The conference was organised in cooperation with the Hamburg Institute of International Economics, HWWA. The papers that were presented at the conference have been published in the January 2002 issue of the HWWA journal *Intereconomics*, vol. 37(1).

[4] COM(2000) 582 final, 27/9/2000.

[5] A "hard-core" cartel is an agreement to raise prices, reduce output or share markets among the members of the cartel.

[6] See the preamble of COM(2000) 582 final, 27/9/2000.

[7] The "comfort" letters are not formal Commission decisions. They are administrative acts that express the view of the Commission, in the form of a letter, that on the basis of the information submitted by the parties concerned, the Commission found no apparent infringements of competition rules. National courts may take these letters into account, but they are not bound by them since they are not Community acts.

[8] See P. Nicolaides, Development of a System for Decentralised Enforcement of Competition Policy, *Intereconomics*, 2002, vol. 37(1).

[9] Some practitioners believe that the 250 or so notifications per year do not impose an excessive burden on the Commission. If, as the Commission claims, they hardly raise any important issues, the Commission should have little difficulty to process them quickly.

[10] An agreement is "exempted" when it falls within Article 81(1) but can satisfy the conditions for exemption under Article 81(3). By contrast, an agreement receives negative clearance when it does not fall within Article 81(1).

[11] For simplicity, the term "practices" in this paper refers to actions by individual undertakings, agreements between undertakings, decisions by associations of undertakings and concerted practices in the meaning of Articles 81 & 82.

[12] In italics are the main provisions of each article of the draft Regulation. ❑