PROCEDURE (ALL INDUSTRIES): COUNCIL REGULATION

Subject: Procedure

Industry: All industries

Source: Commission Statement IP/02/1739 and Commission Memorandum MEMO/02/268, dated 26 November 2002

(Note. As soon as the text of the newly adopted Council Regulation is available, it will be published and analysed: it does not, however, come into force until 2004. In the meantime, the Commission has issued the following Statement and Memorandum about the procedural reforms governing the European Community's rules on competition. The Memorandum is in the form of "frequently asked questions" and answers. The reform is the most comprehensive undertaken since Regulation 17 of 1962: it is designed to simplify the way in which the Treaty's antitrust rules are enforced throughout the European Union. It abolishes the practice of notifying business agreements to the Commission, therefore ending bureaucracy and legal costs for companies; and it will strengthen vigorous antitrust enforcement by means of a better and more effective sharing of enforcement tasks between the Commission and national authorities.)

Commission Statement

The proposed reform concerns the modernisation of the 40-year old procedural rules, embodied in Regulation 17 of 1962, which govern how the EC Treaty's provisions on agreements between undertakings which may restrict competition (Article 81 of the EC Treaty) and abuses of a dominant position (Article 82 of the Treaty) are enforced. The reform, which is the most comprehensive overhaul of the European Community's antitrust procedures in more than 40 years, does not alter the substantive content of Articles 81 and 82 of the EC Treaty. The new rules will come into force on the 1st of May 2004: that is, at the same time as the European Union takes in ten new Member States.

The core features of the reform are:

(a) shifting from a system of authorisation under which all agreements have to be notified to the Commission in order to obtain antitrust approval toward a directly applicable exception system. This puts more responsibility in the hands of the companies who will need to ensure themselves that their agreements do not restrict competition or, in case they do, that these restrictions qualify under Article 81(3). On the other hand it ends unnecessary bureaucracy and legal costs for companies;

(b) making the provisions of Article 81(3) directly applicable, thus allowing joint enforcement of the rules governing restrictive practices by the Commission, the

national competition authorities and the national courts. All competition authorities involved will closely co-operate in applying the antitrust rules.

The reform of Regulation 17 must be distinguished from the upcoming reform of the rules governing merger control. Mergers having a Community dimension, as defined in the applicable Merger Regulation, must still be notified to the Commission before their implementation.

Rationale for the Reform

The existing system was appropriate in 1962 when there were only six Member States and there was little experience in the application of antitrust law governing agreements between undertakings. During the last forty years, however, a great number of individual decisions have been made applying the exemption criteria of Article 81(3) of the Treaty. National competition authorities and national courts are therefore well aware of the conditions under which the benefit of Article 81(3) can be granted. Individual exemptions taken by the Commission are thus no longer indispensable to ensure a uniform application of Article 81(3) of the Treaty. A system of notifications is no longer workable as the EU prepares to take in ten new member states.

How decentralised enforcement will work in practice

The Commission and the competition authorities of the Member States will put into place a network of competition authorities, called the European Competition Network (ECN), which will be a key plank of the new enforcement system. It will allow for greater co-operation between the Commission and the national competition authorities and it will provide for an allocation of cases according to the principle of the best-placed authority. As a guardian of the Treaty the Commission will have a special responsibility in the network. The Commission will also adopt during the course of the next year a number of Notices explaining or clarifying how certain concepts must be understood with a view to provide general guidance and legal certainty for businesses.

Commission Memorandum

What are the main lines of antitrust reform?

The reform adopted by the Council significantly strengthens the enforcement of antitrust rules. First of all, the reform enhances enforcement by simplifying procedures. Companies will no longer have to notify their individual agreements in order to obtain clearance or exemption under the antitrust rules. Notification has created a lot of bureaucracy and cost for undertakings in the past. The new Regulation cuts back this bureaucracy and allows the Commission to focus its attention on those cartel and price fixing agreements that are truly harmful to competition.

Does the reform affect the role of national competition authorities?

A central pillar of this reform is the increased role of national competition authorities. They will become, next to the Commission, the enforcers of EC competition rules. The reform will introduce a mechanism for sharing enforcement tasks between the Commission and national authorities. This is a novelty in the way the Union enforces its competition rules. This reform shows that the Commission does not hesitate to involve a wide network of national enforcement agencies in the implementation of a core Community competence when this clearly contributes to stronger enforcement of EU law. National competition authorities are also encouraged to focus vigorously on the important fight against cartels or price-fixing agreements.

Does this reform prepare the EU for enlargement?

The reform of antitrust proceedings is an important step towards preparing the European Union for enlargement. A system of notification and authorisation of a multitude of individual agreements is simply not workable in the context of a European Union comprising 25 Member States. The new streamlined and simplified system will therefore enter into force on the 1st May 2004, to coincide with the enlargement of the Union through the inclusion of 10 new Member States. By this date, the European Competition Network ("ECN") will have also have been established. Implementation of the network in a working group has already begun: it involves not only the competition authorities of the present Member States but also those of the future new Member States. Co-operation within this network will ensure that antitrust rules are enforced in a consistent manner.

How will the ECN function?

To ensure regular consultation between the different enforcement agencies, a network of European Competition authorities (ECN) will be set up. Regular contact and consultation on enforcement policy will provide a valuable safeguard against divergent application of the antitrust exemption in those cases, where the criteria have not yet been clarified by previous antitrust enforcement practice.

The Commission will remain at the centre of the ECN. It will, as the guardian of the Treaty, ensure that decisions taken by national authorities which make up the new "enforcement community" are consistent and that the antitrust rules are applied in a uniform manner. In this respect, the new Regulation sets out several mechanisms of co-operation between national authorities and the Commission. It ensures, for example, that the Commission is consulted before decisions applying Articles 81 or 82 of the Treaty are taken. Also, there are rules on suspending parallel national proceedings, once the Commission or a national competition authority has started investigations in a particular case. Furthermore, the Commission will continue to deal with cases itself, primarily, but not exclusively, with those affecting more than three Member States.

Finally, the Commission will keep, as an ultimate safety valve, the power to initiate proceedings on its own with the effect that national competition authorities may no longer apply Articles 81 or 82.

How will cases involving the application of Articles 81and 82 of the EC Treaty be allocated among the members of the ECN?

Under the new Regulation, the Commission will not act as a "clearing house" and distribute cases to national authorities. Complainants and leniency applicants will bring their case to the authority they consider best placed to handle it. If the authority in question considers that it is not well placed to deal with a case, reallocation may be envisaged. Each authority should deal with cases which it is well placed to deal with: national authorities are well placed to deal with cases the geographical scope of which does not extend too far beyond their territory. It is not because the geographic scope of a case is limited that it is unimportant or that it does not raise important issues from a competition point of view.

Are the authorities of the candidate countries able to apply the antitrust rules?

In most of the candidate countries, competition authorities had been set up in the early 1990s. For many years, they have been applying competition laws identical or very similar to Articles 81 and 82 of the Treaty. The Commission will pay special attention to the new Member States to help them in the application of the EC competition rules.

How will the reform save cost for undertakings?

Under the old Regulation 17, undertakings believing that their agreements merited antitrust exemption had to notify the agreements to the Commission to obtain individual exemption from the antitrust rules. Exemption was necessary for the agreement to be valid and enforceable in law. Initially, the notification requirement was a good thing for the promotion of the antitrust rules. Prior notification allowed the Commission to obtain information on commercial practices in the different sectors of industry. This expertise was not at all prevalent in the 1960s as the Directorate General for Competition had only just started enforcing the new antitrust rules; and information on commercial reality was deemed necessary to ensure a sufficiently uniform application of antitrust rules. Nevertheless, the notification requirement imposed considerable expenses on undertakings wishing to conclude agreements, especially in the drafting of notifications and the collection of the necessary information.

Under the new system, which is directly applicable, undertakings are freed from the obligation to notify; and their agreements are valid in law automatically as long as the criteria for exemption are met. In a mature system of antitrust enforcement all participants - undertakings, their legal advisers, the competent authorities and national courts - are well aware of the criteria which need to be

fulfilled to obtain antitrust exemption. Forty years of Court of Justice and Court of First Instance case-law and Commission decisions have established a homogeneous body of clear rules on the circumstances in which antitrust exemption under Article 81(3) of the Treaty is available.

What is meant by a "directly applicable"?

The antitrust rules governing restrictive agreements and abuses of a dominant position are directly applicable in the national laws of the Member States. This means that these provisions are sufficiently clear to be directly invoked by individuals in national courts. Direct applicability also means that the national courts can apply the prohibitions contained in Article 81(1) and 82 of the Treaty, if these articles are necessary to resolve national litigation. Direct applicability thus allows every court in every Member State to apply the antitrust rules of the Treaty. It is obvious that direct applicability greatly strengthens the enforcement of antitrust rules throughout the European Union.

However, under the old system set forth in Regulation 17, the Commission had the sole power to apply the antitrust exemption contained in Article 81(3) of the Treaty. National courts could only apply the prohibition as contained in Article 81(1) of the Treaty but not grant antitrust exemption under Article 81(3) of the Treaty.

The new Regulation now makes it clear that also the antitrust exemption as contained in Article 81(3) of the Treaty becomes directly applicable and can thus be applied by national courts. The new Regulation therefore makes Article 81 of the Treaty directly applicable as a whole and aligns it with Article 82 of the Treaty, which has always been directly applicable in its entirety. A directly applicable exception system strengthens the application of antirust rules.

Does this mean that economic analysis will increase in the new system?

It does. Forty yeas of interpreting the prohibition on restrictive practices have demonstrated that the effects of a particular agreement can be assessed only by means of economic analysis of all the facts and market circumstances in which the agreement has been concluded. Under the previous system only the prohibition on restrictive practices as contained in Article 81(1) could be applied by national authorities and courts. The antitrust exemption contained in Article 81(3) of the Treaty could only be granted by the Commission. This led to an unfortunate division between paragraphs 1 and 3 of this provision, which did not facilitate an integral analysis of the economic effects of a particular agreement. Ending the present bifurcation of the different paragraphs of Article 81 of the Treaty will also enhance a more economic approach toward applying this Article as a coherent provision.

If the new system is better for undertakings, why has the Commission applied the notification and authorisation system for the last 40 years?

The notification and authorisation system can be explained only in its historical context. When the original Regulation 17 was adopted in 1962, there was no well developed "competition" or "antitrust" culture in the six original Member States. Neither the European Commission nor the national authorities were very familiar with the different sectors of industry and the commercial practices that prevailed at the time. A system of prior notification enabled the Commission to gather to become familiar with the markets and gather expertise in enforcing the antitrust rules governing restrictive agreements. After 40 years of applying the rules on restrictive practices and granting exemptions under the antitrust rules, the Commission felt that the conditions provided for in Article 81(3) had become clear enough to be directly applicable. In other words, the European Union has meanwhile developed a sufficiently robust "antirust culture". Forty years of case-law by the European Court of Justice, the European Court of First Instance and the Commission has made antitrust enforcement a mature system. A mature system is a system that no longer requires individual notification of restrictive agreements because the rules governing such agreements are well developed and sufficiently clear to undertakings and their legal advisers.

Does the Commission need the power to search private homes?

This new power is necessary to maintain the effectiveness of inspections by the Commission. Under the existing rules, Commission inspectors can enter only company premises. Experience from recent cases has shown that managers often keep relevant documents in their homes. Evidence was even found suggesting that incriminatory documents were deliberately stored in private homes. This means that, under the existing rules, companies can effectively undermine inspections by storing incriminating documents in private homes.

Are there sufficient safeguards for the persons concerned?

The new Regulation provides that searches in private homes can be carried out only if there is a reasonable suspicion that business records, which may be relevant to prove a serious violation of Article 81 or Article 82 of the Treaty, are kept in private homes. This implies that the Commission will search private homes only when it has additional elements suggesting that it is necessary to make such inspections in order to ensure the effectiveness of the main inspection. The new Regulation also ensures that the exercise of this power is subject to authorisation by a judge in every Member State. In carrying out its function, the national judge will ensure that the coercive measures are neither arbitrary nor excessive having regard in particular to the seriousness of the suspected infringement and to the reasonable likelihood that business books and records relating to the subject matter of the inspection are kept in the premises for which the authorisation is requested. These are important guarantees for the persons concerned. They are similar to those existing in the Member States in such proceedings. ■