ESSAYS IN REGULATION

Recent Trends and Developments in European Competition Policy

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1. Introduction

There are three basic factors that can be identified as having played a major role in shaping the Community's competition policy over the past few years:

- the completion of the single market,

- subsidiarity, and

- transparency and efficiency.

The aim of this paper is to examine how these factors have influenced the major changes to the Commission's competition policy that have taken place over the last few years, and in particular in 1992. In many respects the last eight years have been a watershed for the Commission. The period has seen the development of a rigorous, some might argue aggressive, anti-trust policy. It has seen the introduction of the Merger Regulation, and the development of an approach to regulatory control based less on doctrine and legal maxims, and more on economics. Finally, and in particular in 1992, the Community has been coming to terms with the introduction of domestic competition laws in almost all the Member States and, in this context, the imminent entry into force of the Maastricht Treaty. The way in which the Commission has reacted to these changes has laid the foundation for continuing change and continuing improvement.

2. The completion of the single market

The highest priority for the Commission as a whole over the last decade has been the creation of the single market. For private firms this has resulted in intensified competition as their rivals in other Member states have gained access to `their' market. For many publicly owned firms benefitting from state granted monopoly rights, this has meant the removal of the monopoly, and the introduction of real competition.

The task of competition policy, however, is not only the creation of the market, but also its maintenance and its deepening. The following developments in the Commission's policy can be seen to be the result of the single market process.

2.1 Private agreements and practices restricting trade between Member States

The Commission has increasingly taken the view that private restrictions of trade within the Community, in particular agreements or practices limiting trade between member States, are serious infringements of the competition laws. In the Community the markets for many products have been national in scope for many centuries as a result of quotas, import duties, nationally oriented procurement policies, differing technical standards and consumer preferences for domestic goods. In the 35 years since the signing of the Rome Treaty these barriers have been removed one by one. The underlying reason for the creation of the single market is, of course, the desire to increase the competitiveness of Europe's industry. We have seen, and will continue to see, a tendency for prices throughout the Community to fall to the level of the country where they are the cheapest. Evidently, not all companies welcome this for they maximise profitability by differential pricing throughout the Community. They often have every interest in trying to prevent the goods they sell in `low price' Member States from migrating to the `higher price' countries, because such parallel imports force them to reduce their prices to the lowest level.

The Community, on the other hand, which in the final analysis acts on the consumers' behalf, has every interest in ensuring that goods do migrate from low price to high price regions. It therefore continues to take the view that provisions in agreements which endeavour to seal off a national market from Community-wide competition infringe Article 85(1), and that companies involved should be fined heavily.

The Dunlop case is a good example of this. Dunlop distributed its sporting goods through a series of exclusive distributors. Although not part of the formal agreements, it was clearly understood by all parties that distributors might not sell for export, and that Dunlop would ensure that each distributor received absolute territorial protection. Thus, distributors refused to sell to parallel traders and Dunlop engaged in a number of practices designed to make the system work, such as buying-back parallel imports and marking the product so that parallel imports could be easily traced. Dunlop was fined 5 million ECU, the second largest fine imposed by the Commission for this type of infringement.[1]

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1. A fine of approximately 7 million ECU was imposed in the Pioneer case. Commission decision of 14.12.79, OJ 1979, L60/21.

There is no reason to expect that this policy will change; despite the Commission's successful single market programme there remain many trade barriers that cannot be legislated away: different consumer preferences for example. Whilst these remain, companies will retain the possibility of differential pricing, and parallel imports remain the pressure vessel to limit this. Only once the possibility and incentive for firms to differentiate their prices throughout the Community is substantially reduced can the Commission be expected to relax its policy on private trade restrictions. Until then, fines can be expected to remain very high for such infringements.

2.2 Cartels

The whole point of the single market process is the intensification of competition, and competition policy has been at the forefront of the process. The market must not only be wide and free from trade barriers, it must also be one in which the market mechanism operates freely. The Commission has, therefore, focused its activities in the field of competition policy and given the highest priority to the detection, prohibition and deterrence of cartels and abuses of dominant positions. Fines for these have steadily increased over recent years; ICI and Solvay were fined a total of 48 million ECU for dividing up the market for soda ash in 1990, and Tetra Pak was fined 75 million ECU for a number of practices aimed at preventing new entry into the market for packaging materials in 1991. There is no reason to expect this trend to change.

2.3 Liberalisation

2.3.1 The context in which Article 90 is implemented. The third development in Community law that can be seen to be an integral part of the single market process is the use of a number of different legal instruments and, in competition law terms, Article 90 to open whole new sectors of the economy to free competition.

The existence of national monopolies is in principle contrary to the most fundamental principles of the common market. Companies in other parts of the Community are not able to export and sell in the monopolists' territory nor to set up a new business; this infringes Article 30 and the right to free establishment covered by Article 52. It also goes against the basic economic premiss of the relevant provisions of the Treaty: that the operation of the market mechanism will maximise the efficient use of resources and consumer welfare.

It is unsurprising, therefore, that the Treaty provides a number of mechanisms for challenging state monopolies. Article 37, for example, requires that Member

States *"progressively adjust any state monopolies of a commercial character so as to ensure that when the transitional period has ended no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States".*

As a consequence of this the Spanish Treaty of accession to the Community obliged Spain to open up to competition within fixed time periods a number of sectors previously the exclusive domain of a state owned company. The monopoly of Tabacalera has, therefore, come to an end and the petroleum distribution monopoly of Campsa expired in 1992, leading to a wide-ranging restructuring of the Spanish petroleum industry.

Other examples can be cited, notably the Commission proposals under Article 100A to open energy markets to competition via third party access and, most importantly, the opening of the transport markets. A striking example of this is the third air transport package, adopted by the Council in 1992. The reforms introduced by the third package are very far reaching. In principle, all Community airlines are entitled to operate on any route in the EC. However, a limited number of exceptions to this general principle exist, by far the most important of which is that until April 1997, limits may be imposed on the rights of non-domestic airlines to operate "cabotage" services (i.e. purely domestic routes) unless the service is an extension of an international service and such services do not exceed 50% of route capacity. The effects of this very significant liberalisation measure have already begun to emerge.

The developments in the Commission's use of Article 90 over the previous years must, therefore, be seen and understood as just one part of a wider process taking place in the Community.

2.3.2 The text of Article 90. Article 90(1) and 90(2) state that:

"1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular those provided for in article 85 and Articles 86 to 94.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community."

These provisions contain two basic rules:

(a) No amnesty for public companies from EC Law

This can be interpreted in two possible ways:

-If a company is granted a legal monopoly to provide certain services, for example to run trains, this does not mean that the manner in which it carries out that activity cannot infringe Article 86. For example, if a monopoly refuses to provide the monopoly service unless the customer also purchases other non-monopoly services at the same time, this will infringe Article 86.[2]

-In some cases, the very granting of monopoly rights could infringe one or more Articles of the Treaty, dealing for example with free movement or free establishment. Furthermore, if the monopoly is not functioning as efficiently as one or more private companies would do were the market to be opened to competition, the existence of the monopoly could infringe Article 86, as this Article explicitly lists as an abuse "limiting production, markets or technical development to the prejudice of consumers". Thus, if a public monopoly is unable to meet demand, the grant of the monopoly in itself could constitute an infringement of Article 86 in conjunction with Article 90(1).

However, the positioning of Article 90 in the Treaty, and its specific reference to the competition Articles, means that it is not possible to determine whether one or both of these possible interpretations of Article 90(1), and in particular the `illegal monopoly' theory, are correct based simply on a reading of the text.

(b) The public policy exception

Actions by companies, whether they be state or privately owned, that are in principle contrary to the Treaty, may nonetheless be justified if strictly necessary to carry out some public service function imposed on the company by the Government. An example of this might be the fixing of a uniform tariff for

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2. See, for example, Telemarketing v. CLT. Judgement of the Court of 3.10.1985, ECR 1985 3261. Telemarketing had certain monopoly rights regarding TV transmissions in Luxembourg. It refused to sell advertising space for telephone sales unless the advertiser also used Telemarketing's telephone sales facilities. This practice of tying is an established abuse of a dominant position, and the existence of the special rights granted by Luxembourg was no defence: it was unnecessary for Telemarketing to extend its monopoly in this manner to carry out its broadcasting activities.

standard letters by the Post Office. This clearly results in discrimination against customers in large cities, as it costs much less to collect from and deliver to these areas than to remote, rural addresses. Such cross-subsidisation would normally be an abuse of a dominant position: *"applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage"*. However, if this is the only way in which it is possible to perform the public service mission imposed on the Post Office -- ensuring a universal delivery and collection service throughout the territory at reasonable prices -- then it is compatible with the Treaty by virtue of 90(2).

It is clear, however, that this does not give a *carte blanche* to companies carrying out public service functions: it is an exception to a basic rule of the Treaty, and as such, must be interpreted narrowly.

Article 90(3) state that:

"The Commission shall ensure the appplication of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States."

This provides that only the Commission may adopt decisions pursuant to Article 90, and may do so either in the form of a specific decision addressed to a Member State or in the form of a Directive, which may be addressed to one or more Member States.

2.3.3 Interpretation of Article 90 by the Commission and the Court of Justice

(a) <u>The public policy exception</u>

For many years the Commission's application of Article 90 was limited to an examination of the scope of the Article 90(2) exception. A company granted special or monopoly rights by a Government would argue that its participation in an illegal agreement or its abuse of its dominant position was excused by virtue of Article 90.

It is clear from these cases that the Commission and the Court of Justice take a very restrictive interpretation of Article 90(2) and consider that it is only possible to benefit from this provision if the action in question is strictly necessary for the achievement of the legitimate public service objective in question.

Examples where the Commission rejected a defence under Article 90(2)[3] include the British Telecom case. In the early 1980s it was cheaper to send a telex to the US from the UK than from a number of other EC Member States. Thus companies would send a telex to a message-forwarding agency in the UK, which would relay the message to the US. In order to maintain harmonious relations with its EC telephone monopoly counterparts, British Telecom attempted to prevent these agencies from under-cutting the other Telecoms monopolies. In order to do this, it refused to supply the forwarding agencies with telex services unless they limited their activities to sending telexes originating in the UK, or, if relaying a message received from another EC Member State, to charge for relaying the service on the basis of the relevant tariff of the PTT in the originating country. The Commission found that BT's monopoly rights to operate telephone services in the UK did not provide a defence against the finding that its actions contravened Article 86.

On the other hand it is clear that Article 90(2) can and does justify the existence and maintenance of certain special or exclusive rights and behaviour that could, in other circumstances, consitute an infringement of the competition rules. No exhaustive list of legitimate public service objectives exists.

However, the provisions of the Treaty that lead to the conclusion that the grant of a monopoly may be incompatible with the Treaty are Articles 30, 59 and, in certain circumstances, Article 86, all in combination with Article 90. When Articles 30 and 59 are considered in isolation a two-stage test is applied. If a barrier to imports or exports of goods or services is identified, a *prima facie* finding of illegality exists. Nonetheless, if it can be demonstrated that the barrier is imperative for the achievement of a number of objectives listed in Articles 36 and 56, or one of a number of `mandatory requirements' that have been developed by the Court of Justice, the barrier is viewed as legal. It is therefore logical to look to Articles 36, 56 and the mandatory requirements to judge, by analogy, whether the grant or maintenance of a given monopoly right can be justified under Article 90(2). These factors include:

- public policy,
- public security,
- public health,
- protection of the environment,
- consumer protection, and

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3. See also Decca Commission decision of 21.12.88, OJ 1988 L43/24 at paragraphs 128-30, Ijsselcentrale Commission decision of 16.1.91, OJ 1991 L28/32 at paras. 39-52, France v. Commission Judgement of the Court of Justice of 19.3.91, 1991 ECR 1979 at grounds 11-12, and RTT v. GB-Inno Judgement of the Court of Justice of 13.12.91, not yet published.

- social protection.

(b) The granting of a monopoly may, in itself, infringe Article 90

From the late 1980s onward the Commission also developed the now well established principle that the grant/maintenance of a monopoly right can in itself infringe the Treaty, indirectly infringing Articles 30-36, 59 and 86. Although in a number of Judgements the Court gave clear indications that Article 90 could be interpreted in this manner, it did not have the opportunity of confirming this explicitly until the Commission adopted the Directive on telecommunications terminal equipment in 1988.[4] France challenged the Directive in the Court of Justice, but it was upheld by the Court.[5]

An excellent example of the application of this theory, however, is the Hofner case.[6] Under German law a monopoly for the provision of placement services was granted to the Bundesanstalt, the Federal Office for employment. Hofner provided `head-hunting' services. Although this was strictly illegal, the Bundesanstadt tolerated such operators: it had limited resources, and could not meet all the demands on its services. Allowing `head-hunters' to service the professional end of the market left it free to concentrate on other areas where companies were less willing to pay large fees for placement services. One of Hofner's clients refused to pay for services provided, arguing that the provision of the service was illegal. A Court in Munich asked the Court of Justice a number of questions to determine whether the law granting the monopoly infringed Article 90.

The Court of Justice found that it was indeed contrary to Article 90, and in its judgement significantly developed and explained the `auto-abuse' theory: the granting of a monopoly may infringe Article 86 in combination with Article 90. If a Member State grants an exclusive right to carry out a service to a particular company or authority, which is however *"manifestly not in a position to satisfy the demand prevailing on the market for activities of that kind"*, the undertaking in question *"merely by exercising the exclusive right granted to it, cannot avoid abusing its dominant position"*. As a consequence, the grant of the monopoly infringes Article 86 in combination with Article 90(1).

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4. Commission Directive 88/301 of 16.5.88, OJ 1988 L131/73.

5. France v. Commission. Judgement of the Court of Justice of 19.3.91, 1991 ECR 1979.

6. Judgement of the Court of Justice, 23.4.1991, not yet published.

Thus the Court has stated clearly that, in principle, the granting of monopoly rights by a Member State is contrary to the Treaty, and in particular Article 90 in combination with Articles 30-36, 59 and in certain cases, Article 86. The question remains in each case whether the monopoly is necessary to achieve a particular public service function. If so, the grant of the monopoly can be justified pursuant to Article 90(2).

2.3.4 Application of this principle through Commission Decisions and Directives: liberalisation and EEC competition policy. Although the initial development of the principle that the grant of monopoly rights can infringe Article 90 came from the Court, the Commission has, albeit slowly and cautiously, used this instrument to open new markets to competition. Article 90(3) states that the Commission can enforce Article 90(1) either by decision or by directive. Although the Commission has used the possibility of adopting individual decisions on a number of occasions[7], it has concentrated its efforts on directives. Directives enable the Commission to oblige all Member States to liberalise specified services and this approach is far more time-saving than adopting up to twelve individual decisions, one for each Member State. A number of Member States challenged the Commission's jurisdiction to adopt such measures by Article 90 directive, arguing that the appropriate route would be a Council directive. The Court, however, has confirmed the Commission's authority to adopt these measures.[8] Directives adopted to date are:

- Telecommunications terminal equipment[9]: *"Member States that have granted special or exclusive rights within the meaning of Article 1 to undertakings shall ensure that these rights are withdrawn."*

- Non-voice telephony services[10]: *"Without prejudice to Article 1(2)[11], Member States shall withdraw all special or exclusive rights for the supply of telecommunications services other than voice telephony and shall take the measures necessary to ensure that an operator is entitled to supply such telecommunications services."*

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7. See, for example, Dutch express delivery services. Commission dated 20.12.89, OJ 1989 L13/34.

8. See France v. Commission, Judgement of the Court of Justice, 19.3.91, ECR 1991 1223.

9. Directive 88/301, 16.5.88, OJ 1988, L131/73.

10. Commission Directive 90/388, 28.6.1990, OJ 1990 L192/10.

11. "This Directive shall not apply to telex, mobile telephony, paging and satellite services".

2.3.5 Recent developments: continuing liberalisation? Recent developments of note include the following:

(a) Satellites: a paper has been sent by the Commission to interested parties for comment. The liberalisation of access to and the operation of satellite services is envisaged.

(b) Postal Services Green Paper: *"Under this option of seeking equilibrium, certain services should be removed from the reserved area. These are express services and publications. Based on this analysis, that has been made to date, the liberalisation of cross-border letters and, a priori, of direct mail would also be envisaged."*

(c) Telecommunications: the 1992 Review of the situation in the telephone services sector identified the problem that the cost of international calls is very high in the EC. This results from the `frontier effect': a call that crosses a border in the EC will be charged at 2.5 to 3 times the price of a domestic call of equivalent distance. In other parts of the world long-distance calls have been liberalised for some time (e.g. U.S.A., Japan). In these countries the price of long-distance calls has fallen dramatically, whilst growth in the use of these services has increased enormously. This has led to traffic diversion from the EC to cheaper countries, in particular to the US where the call-back mechanism is gaining in popularity.

The Review identifies four possible approaches of the Commission to this situation:

Option 1 - maintenance of the *status quo*;

Option 2 - extensive regulation of tariffs and investment at the Community level;

Option 3 - the liberalisation of all voice telephony including EC, international and domestic calls; and

Option 4 - further, albeit limited, liberalisation, including the opening to competition of voice telephony between Member States.

The Green paper indicated the Commission's view: *"option 4 seems better suited than the others to the fundamental objectives of the Community in this policy area."* [12]

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[12] There was a Council resolution in June 1993 to the effect that public telephony within the EC should be liberalised by 1 January 1998, although Member States with "less developed

2.3.6 Conclusion. The Commission's approach to the use of Article 90 as a tool for opening markets to competition has been both cautious and gradual. It has opened much of the telecommunications market by adopting a step-by-step approach. The reason for this has been the recognition and acceptance of the absolute need to respect the legitimate public service objectives of the Member States, and in particular the achievement of the universal service objective. Thus, before proceeding with the next step, it has made absolutely certain that its previous action has in no way impaired the ability of the relevant company to achieve the public service objectives entrusted to it.

Nonetheless, it is clear that the Commission will continue its policy of prohibiting monopoly rights unless they can be reasonably shown to be necessary for the attainment of public service objectives.

networks" are given a transitional period of an additional five years.

3. Subsidiarity

3.1 Introduction

Article 3b of the Maastricht Treaty formally introduces the concept of subsidiarity into the EEC Treaty for the first time:

"The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty."

It is easy to be cynical with respect to Article 3b and to present it as window-dressing. The reality is, however, somewhat different. Once the Treaty has entered into force later this year, every single action of the Commission and the Council will have to be examined in the light of Article 3b. A Member State will be entitled to challenge any Community action on the grounds that it could be adequately achieved by measures taken by the Member States individually. Indeed, the Commission itself recognised that in the past it has over-stepped this mark in some cases and it presented a paper at the Edinburgh summit listing a number of measures that should be repealed and proposals that should be withdrawn.

With respect to competition policy, however, the initial comment must be made that the jurisdictional division between action by the Commission and action by the Member State competition authorities has always been based on subsidiarity. In essence, subsidiarity means `best level', and if the Community is to have an effective and coherent competition policy there are a number of tasks that can be carried out only at the Community level.

For example, in order to determine whether an agreement or indeed a merger or acquisition is likely to affect competition adversely, it is essential that it be examined in its correct economic context. In other words, the relevant market must be correctly defined. When defining the market, in particular the relevant geographic market, it is vital to take fully into account not only those companies already selling in a particular country or region, but also any potential

competitors. In order to do so properly, it is often necessary to make enquiries wider than a single Member State: one way to find out whether a `foreign' company would enter a neighbouring market in response to a price rise by a dominant domestic company is to ask it. Only the Commission has the resources, both in terms of fact-finding and language, to carry out the task. For example, in the Mannesmann/Hoesch case, which was notified under the Merger Regulation in mid 1993, the question arose whether Germany was the relevant geographic market for steel gas pipes. If so, the merger would have created a single company with very high market shares, and it was likely that the deal would have been prohibited. However, the Commission was able to establish, on the basis of detailed fact-finding throughout the Community, that the threat of entry by non-German pipe manufacturers was real and substantial. In this light the merger was allowed to proceed.

Subsidiarity should not therefore be equated with a lack of action by the Commission in relation to competition policy. It does, however, require the establishment of a coherent framework that ensures that the Commission has jurisdiction to examine those cases that require analysis in an economic context wider than a single Member State, but abstains from action in cases which have effects limited to a single country.

In fact, if one considers the competition rules, it becomes clear that the jurisdictional divide between the Commission and the Member State authorities has always been based on the subsidiarity principle. This can be seen from the following examples:

- The authors of the Treaty of Rome effectively included the subsidiarity principle in Articles 85 and 86, and in the state aid provisions of Article 92, as the Commission's jurisdiction to act is limited to cases in which the agreement, parctice or aid in question affects trade between Member States. The Court of Justice has established that an appreciable effect on trade must be established, not simply a theoretical one.

- The Merger Regulation is a particularly good example of the application of the subsidiarity principle. The adoption of the Regulation was a recognition by the Member States that common action was necessary to provide an efficient and effective regulatory mechanism to vet the increasing number of mergers and acquisitions that have truly Community-wide consequences. However, in order to avoid the effect of simply creating an additional layer on top of existing national merger controls, the Regulation is under-pinned by the one-stop shop principle: any merger/acquisition must be vetted either by the Commission or by the competition authorities of the Member States, but never both. Thus it was

necessary to find a mechanism that enabled a clear and simple division between those concentrations to be examined at the National and Community levels.

In order to devise such a mechanism, it was necessary first to identify the theory on which the division should be based: mergers and acquisitions that have economic effects wider than a single Member State should fall only under the Commission's jurisdiction; those with effects limited to a single Member State should be the exclusive preserve of the relevant national authority. During the negotiations leading to the adoption of the Regulation, many different tests that reflected this theoretical ideal to a greater or lesser extent were examined. However, the basis on which the delineation should, in theory, be made is strictly economic and really can be achieved only through a case-by-case approach.

Unfortunately, this is not practicable, given the need for clarity, predictability and legal certainty. Thus the Regulation contains criteria based on turnover, with concentrations meeting the 5bn. ecu, 250million ecu and two-thirds rules falling under the Commission's exclusive jurisdiction, and the rest under the jurisdiction of the Member States. This choice is based on the partial fiction that mergers by or between large companies are highly likely to have economic effects throughout the Community.

The system is further refined by the referral provisions contained in the Regulation. The thresholds are a somewhat blunt instrument: they are a compromise between the desire to meet the underlying objective and the need for simplicity. Thus is it inevitable that some concentrations that have EC-wide effects will fall below the thresholds (e.g. Guinness/Cruz Campo), and some with effects limited to a single country will meet the thresholds (e.g. Tarmac/Streetley, Cargill/Unilever). Referral provisions therefore exist to refine this system:

- Article 9, referral to Member States; and

- Article 22(3), referral to the Commission (eg. British Airways/Dan Air).

This is, therefore, a clear attempt to implement the subsidiarity principle in practice.

Revision of the thresholds is foreseen in the Regulation. The Commission is now collecting and analysing factual data to determine whether the thresholds require revision to reflect more clearly their underlying purpose, and thus the subsidiarity principle.

From these examples, it can be seen that subsidiarity is at the heart of EC competition policy. This does not mean, however, that Article 3b has no role to

play in this area. In 1992 there were a number of developments that, over time, will enable the Community to continue to adapt to change and will lead to a better, more efficient division of competence in competition cases between the Commission, the national competition authorities, and national courts.

The most important of the developments with which the EC competition policy is coming to grips is the rapid growth in anti-trust enforcement at the national level. For a number of reasons, and in particular the development of a rigorous anti-trust policy at the Community level and the debate surrounding the adoption and implementation of the Merger Regulation, national legislators have recognised the importance of domestic competition laws. Thus either amendments to make existing laws more effective or entirely new laws have been adopted in, *inter alia*, Italy, Portugal, Spain, Denmark, Belgium and Ireland. The Netherlands is currently debating whether to introduce its first ever effective competition legislation; the UK has considered proposals to strengthen significantly its existing statutes.

These developments have also been accompanied by a recognition of the importance of effectively applying EC competition law at the national level: for example, legislation has been adopted in France and Germany confirming the ability of domestic competition authorities to apply Articles 85(1) and 86.

In the past, the Commission and the Court of Justice took the view that it was necessary to have a very wide definition of the Commission's jurisdiction to act. Thus the Court has given a wide interpretation to the concept of effect on trade between Member States: only a "direct, indirect, actual or potential effect on trade between Member States" need be demonstrated by the Commission. This is because if the Commission had not in the past intervened to prohibit and deter cartels in many countries, these would have continued to operate with impunity.

With the recognition by all Member States of the need for effective anti-trust enforcement, the imperative for intervention diminishes, and this tendency is reflected by developments in 1992, which have been characterised by the beginning of a process of decentralisation of the implementation of Community competition law towards national courts and competition authorities.

3.2 The National Courts Notice

Many years have passed since the Court of Justice confirmed that Articles 85(1) and 86 are directly effective and applicable by national courts. The Commission has also increasingly recognised the importance of using national courts for the decentralised application of Community competition law for the following reasons:

- to make EC competition law more accessible and more quickly and readily available;

- to optimise the use of the resources at the Commission's disposal;

- national enforcement can result in real advantages for the individuals/companies in question: national courts can give immediate interim relief through injunctions, can award damages and can consider an action with simultaneous claims based on both EC and national law. Finally, national courts can award costs to the successful party.

In order to promote and facilitate the application of Articles 85 and 86 by national courts and to foster effective co-operation between the national courts, national competition authorities and the Commission, the Commission adopted, on December 23rd 1992, a notice on "co-operation between national courts and the Commission in applying Articles 85 and 86". The notice covers three basic aspects: (1) the Commission's underlying approach to the decentralisation of Community law, (2) guidance on how to deal with the Commission's monopoly over the application of Article 85(3), and (3) co-operation between the Commission and the Courts.

3.2.1 The Commission's underlying approach to the decentralisation of Community competition law. Paragraphs 13-15 of the Notice set out the Commission's approach to decentralisation:

"13. As the administrative authority responsible for the Community's competition policy, the Commission must serve the Community's general interest. The administrative resources at the Community's disposal to perform its tasks are necessarily limited and cannot be used to deal with all the cases brought to its attention. The Commission is therefore obliged, in general, to take all organisational measures necessary for the performance of its tasks and, in particular, to establish priorities.

14. The Commission intends, in implementing its decision-making powers, to concentrate on notifications, complaints and own-initiative proceedings having particular political, legal or economic significance for the Community. Where these features are absent in a particular case, notifications will normally be dealt with by comfort letter and complaints should, as a rule, be handled by national courts or authorities.

15. The Commission considers that there is not a sufficient Community interest in examining a case where the plaintiff is able to secure adequate protection of his

rights before the national courts. In these circumstances the complaint will normally be filed."

This policy statement in fact goes far wider than the question of relations between the Commission and national courts.

3.2.2 How to deal with the Commission's monopoly over Article 85(3). A monopoly over the application of Article 85(3) is entrusted to the Commission by Regulation 17/62. This does not apply to Article 86, which is directly applicable in its entirety.

As Commission decisions take precedence over national ones, the Notice states that domestic courts must be vigilant not to give judgements that conflict with Commission decisions, even future decisions. Thus, the notice states that *"if the national court concludes that an agreement is prohibited by Article 85(1), it must check whether the agreement is or will be the subject of an exemption by the Commission under Article 85(3)."* The Notice then goes on to provide practical guidance on how to do this. It lists a number of possible scenarios and indicates the approach that a court should adopt:

- Scenario 1: if the Commission has already adopted an individual exemption decision in the case in question, the national court must follow the Commission decision.

- Scenario 2: if the agreements in question fall under a block exemption regulation, since an exemption has been granted to the agreement in question, this must be followed by the national court.

- Scenario 3: if no exemption has been granted, the agreement should have been notified, and the parties have failed to do so, then no Article 85(3) exemption is legally possible for procedural reasons. The national court is therefore free to apply Article 85(1) and strike down the agreement by virtue of Article 85(2).

- Scenario 4: if the agreement has been validly notified, but after having examined the agreement in the light of Commission and Court jurisprudence, the national court concludes that it is clear that *"the agreement, decision or practice cannot be the subject of an individual exemption",* the Notice states that the national court may apply Article 85(1). This is an application of the *"acte clair"* doctrine previously seen in the interpretation of Article 177. This is a significant innovation, and should assist the decentralised application of Article 85.

- Scenario 5: if the agreement has been validly notified and, after having examined the agreement, the national court has doubts whether an individual exemption is possible, the Notice states that the court should: *"suspend proceedings while awaiting the Commission's decision. If the national court does suspend proceedings it remains free, according to the rules of the applicable national law, to adopt any interim measures it deems necessary."*

3.2.3 Co-operation between the Commission and the national courts. In EC legal systems, there are many courts that have jurisdiction to apply Articles 85(1) and 86, but which have little or no experience of EC law in general and of anti-trust law in particular. The prospect of giving judgement in a complicated Article 85 case is daunting and this may be one important factor behind a lack of enforcement by national courts in the past.

Article 177 of the Treaty endeavours to meet this concern, but it is limited to purely legal questions and it is a long and cumbersome procedure. The Notice therefore provides that the Commission "intends to work towards closer co-operation with national courts". The most important aspect of this is that the Commission, and in particular DGIV, will answer the following types of questions posed to it by national courts:

- Procedural: Has a case been notified? Have proceedings been opened and a statement of objections sent? How long will be needed for the Commission to decide whether an Article 85(3) exemption can be granted?

- Legal: Article 177 already permits national courts to refer legal questions to the Court of Justice. The Commission therefore has to be careful in agreeing to reply to any such questions posed to it by national judges; if it were to reply to questions that raised new issues of legal interpretation, it would be usurping the Court's role. Thus, the Notice is cautious in this respect, indicating that the Commission will answer questions in relation to its *"customary practice in relation to the interpretation of Community law.....in its replies the Commission does not get into the merits of the case"*. Furthermore, the notice states that it will give an interim opinion on whether any agreement is likely to be eligible for individual exemption. This last aspect of the Notice is particularly important, as it will enable a national judge to give judgement with a greater degree of security regarding the question whether any given agreement is exemptable and will facilitate the use in practice of the "*acte clair*" doctrine.

- Factual: The Commission will provide national judges with any data, market studies etc. available to the Commission, subject to the limitation that the Commission may not pass on business secrets.

3.3 The Automec Judgement

The Commission receives a great number of complaints. Many, indeed most, concern local, regional or national disputes. Relatively few involve issues of concern to the Community in legal or economic terms. In the past, the Commission has nonetheless dealt with them, because otherwise no redress would be available through national competition law and because national judges, reticent to apply Articles 85 and 86, tended to suspend proceedings and await a Commission decision on the case in question.

The introduction of national competition laws throughout the Community, and the impetus of the national courts notice, has lead the Commission to reverse this policy.

If a complaint does not involve an issue of importance to the Community as a whole, and can be adequately dealt with at national level, the subsidiarity principle requires that it be dealt with by the Member State. Thus, in 1988 the Commission formally rejected a complaint lodged by a company called Automec, not because no infringement of Community law was found, but because the case gave rise to no issues of Community interest and adequate redress was available either via an action under Community competition law in national courts or under national competition law. Automec appealed the decision of the Commission. The Court supported the Commission. It found that because the resources of the Commission are limited, priorities had to be set in order that the Commission be able to carry out its central function of laying down the basic rules and approach for the application of Articles 85 and 86. Thus it may validly decline to act in response to a complaint where (i) no issue of significant political, economic or legal importance for the Community as a whole is raised, and (ii) adequate redress is available at national level.

Since this judgement, the Commission has confirmed on a number of occasions that henceforth its policy will be to reject such complaints, referring the complainant to national courts and competition authorities. The national courts Notice explicitly confirms this approach. In November 1992, the Commission rejected a complaint on these grounds. A number of French discotheques complained that SACEM, the performing rights society for the French music industry, was abusing its dominant position by charging excessive prices. In a

press release[13] the Commission stated that *"since the effects of any abuse by SACEM would be felt chiefly in France, it has decided, in the interests of co-operation and burden-sharing with the national courts and authorities, to refer the complaint back to them....."*.

3.4 Terminating the Commission's monopoly over Article 85(3)?

No-one disagrees that if the monopoly over the application of Article 85(3) were lifted, this would have the effect of much greater enforcement of Article 85 at the national level. Is the time not right to take this step?

In a speech in December 1992,[14] Sir Leon Brittan argued against the lifting of the monopoly on the ground that one cannot say that a single standard of substantive review already exists. This remains true despite the signifciant increase in Member State enforcement of anti-trust laws in recent years, and despite the wide, albeit not universal, acceptance throughout the Community that a vigorous competition policy is an essential part of an effective industrial policy in a market economy. It is widely believed, for example, that the Federal Cartel Office in Germany takes a more restrictive view of the likelihood of potential entry than the Economics Ministry in Paris. If the monopoly over the application of Article 85(3) were lifted in these circumstances, there would be the real risk of the differential application of Article 85. If different standards of substantive review were applied, forum shopping would inevitably result. This would run totally contrary to the common market objective and would result in the distortion of capital flows.

These arguments are convincing and, it is submitted, it is unlikely that we will see a change to this position in the near future.

3.5 Conclusions

Community competition policy is a good example of how subsidiarity can work in practice. The basic provision according to which the jurisdiction of the Commission and the Member States is allocated, the effect on trade test, is both logical and appropriate. The use of thresholds to allocate competence for mergers and acquisitions, whilst imperfect, seems to work well in practice, particularly when the referral provisions are taken into account.

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13. IP(92)977, 27.11.1992.

14. The future of EC competition policy. Centre for European Policy Studies, Brussels, Monday 7th December 1992.

1992, however, saw a considerable number of developments that will, in the medium term, result in a significant decentralisation of the application of Community law. The Commission's policy on complaints following the Automec judgement will see many more cases dealt with by national courts. The cooperation procedure announced in the national courts notice, together with the application of the "*acte clair*" doctrine to the question of whether or not an agreement is exemptable, will substantially facilitate the task of national courts in applying the Community competition rules. Indeed, in time, 1992 may well be seen as the year when the process leading to real and effective decentralisation of Community competition really began. Although Sir Leon Brittan stated that he believed that the time is not yet right for the ending of the Commission's monopoly over Article 85(3), he acknowledged that it was only a question of time before the standard of review throughout the EC becomes sufficiently homogeneous to remove this final obstacle to the real and full decentralisation of Community competition law.

5. Efficiency and transparency: procedural reform

It is in the interest of all that the Community's competition policy is implemented in a manner that provides legal certainty and a rapid decision-making process. These issues are particularly important for industry, which needs to be able to react quickly to changes in the market place to remain competitive.

This need was recognised in 1989 with the adoption of the Merger Regulation. With its very tight deadlines and highly effective one-stop shop system of jurisdiction allocation, the Regulation meets these needs of industry in relation to mergers and acquisitions. In implementing the Regulation, the Commission has shown itself capable of meeting the ambitious deadlines set by the Council and, furthermore, of producing decisions of high quality. It is inevitable, therefore, that the Commission has been examining how it can use the lessons learnt in merger control in its other areas of activity. One might imagine that the Commission would simply superimpose the time limits that it respects in merger cases onto its Article 85 and 86 cases. However, in reality this is neither possible nor desirable since:

- far more resources are dedicated to merger control than to Article 85/86 cases;

- Article 85 and 86 cases give rise to a much greater variety of issues than do mergers and acquisitions;

- the procedure set out in Regulation 17/62 makes decision-making within the time limits of the Merger Regulation impossible;

- in contested cases, the need to guarantee the rights of the defence is, quite correctly, a time consuming process; and

- in complicated cartel cases the quantity of evidence and analysis necessary to prepare a convincing case makes it impossible to respect very short deadlines.

Naturally, the simplest way in which the Commission could shorten the time in which it deals with cases would be to inject more resources. However, to reduce the case handler/file ratio in Directorates B/C/D of DGIV to those in the Task Force would require more than a doubling of staff. This, it must be accepted, is unrealistic, particularly in today's economic climate. The Commission has therefore been examining what can be done with the limited resources that it has available. This is an on-going examination. The first fruits have, however, already appeared.

The Commission has identified structural joint ventures as agreements in which a speedy decision is the most important. Such cases, involving a change in the ownership of assets, are often impossible to unscramble once they have been put into effect. The Commission has therefore stated that it will endeavour to inform the parties whether it has serious doubts on the compatibility of the structural joint venture with the competition rules within two months of a complete notification. In practice this is is done in one of three ways:

- by sending a comfort letter and closing the file, or

- by sending a letter informing the companies that DGIV intends to propose that the agreement is formally exempted by means of decision, or

- by sending a warning letter to the companies.

In reality, almost all of the notifications are dealt with by means of a comfort letter sent within a two month period. Whilst the Commission could, at least in theory, withdraw a comfort letter without any warning or formal procedural step, in practice this is highly unlikely. It is in the Commission's interest for companies to be willing to accept a comfort letter, and thus it considers the withdrawal of a comfort letter to be a very significant step. In practice, the Commission will not withdraw the benefit of a comfort letter unless circumstances have changed so significantly that it would also revoke a formal exemption decision.

The warning letter is also a significant innovation. This explains the Commission's concerns, and the parties are therefore, as under the Merger

Regulation, at an early stage of the procedure able to address the concerns of the Commission via undertakings, or to prepare and present their defence.

Naturally, this is not the limit of the ambitions of DGIV, which would like to be in a position to provide a very fast decision-making procedure for all cases. Thus, it will be examining carefully how the new system regarding structural joint ventures works in practice. Will, for example, it lead to an increased number of notifications? How will companies react to the new procedure?

With the experience gained by the Commission in implementing this new procedure it will be able to continue to review its procedures, and, it is hoped, continually to improve them.