

Memories of a former official

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The history of the Directorate-General for Competition can not be dissociated from the history of the European Commission. As one of the four institutions of the then European Economic Community – i.e, the Council of Ministers, the European Commission, the Parliamentary Assembly (later to become the European Parliament) and the Court of Justice – DG Competition was set up shortly after the coming into force of the EEC Treaty on the 11th of April 1958. At the same time the Commission got its initial structure, which remained unchanged until the Merger Treaty entered into force on July 1st 1967 and the three European executives – the European Coal and Steel Community, the European Economic Community and Euratom – merged.

The initial College of Commissioners was composed of nine members. France, Germany and Italy nominated two Commissioners each; the Benelux countries had one Commissioner each. The Commission's activities were entrusted to nine Directorates-General identified by Roman numerals: DG I - external relations; DG II - economy and finance; DG III - common market and industrial policy; DG IV- competition; DG V - social policy; DG VI - agriculture; DG VII - transport, DG VIII - associated third countries; DG IX - administration. Each Commissioner was in charge of one Directorate-General and its related policy area.

The distribution of policies between the Commissioners often corresponded to the political focus of their respective Member States. So it was not by chance that competition policy became – and for a long time remained – a German remit; while economy and finance as well as association of third countries (which included former colonies) were entrusted to French Commissioners, and agriculture to the Dutch Commissioner. A trend

towards the establishment of lasting national positions within the College was certainly present in the Commission's early years. Fortunately it soon disappeared. The German Hans von der Groeben was in charge of competition policy from 1958 to 1967. He was followed in this function by eleven successors of different nationalities, namely the Dutchman Emanuel Sassen (1968-1971), Albert Borschette and Raymond Vouel from Luxembourg (1972-1980), the Dutchman Frans Andriessen (1981-1984), the Irishman Peter Sutherland (1985-1988), Sir Leon Brittan from the United Kingdom (1989-1993), the Belgian Karel van Miert (1994-1999), the Italian Mario Monti (1999-2004); the Dutch Nelly Kroes (2005-2009), the Spaniard Joaquín Almunia (2010-2014) and the Danish Margarethe Vestager (since 2015).

In contrast, the post of Director-General for Competition was occupied by fewer officials generally serving over longer periods of time. After the Dutch Pieter VerLoren van Themaat (1958-1967), DG IV/DG Competition) was headed by six

German Directors-General, namely Ernst Albrecht (1967-1970), Willy Schliedier (1971-1980), Manfred Caspari (1980-1990), Claus Dieter Ehlermann (1990-1995) and Alexander Schaub (1996-2002). Their presence and activities reflected the German concept of social market economy, which dominated both the interpretation and the application of competition rules until the end of the 20th century, thereby giving the Commission's competition policy a high degree of continuity and stability. In the new century, the Directorate-General was headed by the British Sir Philip Lowe (2002-2010), the Dutch Alexander Italianer (2010-2015), and the German Johannes Laitenberger (since 2015).

I joined DG Competition in January 1967. Over the preceding 18 months I had worked under civil servant's contract in DG III-industrial policy and common market, where I dealt with problems relating to the medical and paramedical sector. My role consisted essentially in the preparation and drafting of Commission proposals for Council directives having as their object the removal of various restrictions which hindered nationals of a Member State in the exercise of their non-salaried professional activities in another Member State. This work of a legislative nature implied numerous meetings with national authorities, in which we tried to overcome the reluctance of certain Member States. I very much enjoyed my stay in DG III. To work together with colleagues from other Member States for the attainment of a European objective within a totally new supranational administration and in a foreign language (at that time, of course, French) was very stimulating for a young

man like me. However, it was frustrating to realise that our work was given a low priority. The Commission proposals we drafted in 1966 were adopted by the Council almost unchanged, but only ten years later. This led me to look for a permanent position in another DG.

My favourite was DG IV (now DG Competition), mainly because of its powers of direct intervention vis-à-vis undertakings and Member States, which made this DG particularly attractive for newcomers. However, it was not easy to get one of the few posts published from time to time. Each applicant had to go through a concours sur titres which included a long and intensive interview. There were several hundred contractual employees who wished to become permanent Commission staff. Therefore competition between the many applicants for each post was rather keen. I applied to several posts in DG IV and had the good luck to win one of the concours. A few days later, I was appointed administrator and assigned to Directorate IV/A-general competition policy, where I spent most of the 36 years as a Commission official. I was assigned to Division IV/A/2, a unit charged with general legal questions and legislation. This included coordination between the DG's different Directorates and cooperation with the Commission's legal service.

Between 1963 and 1990, DG Competition had a relatively simple structure, initially composed of five directorates (A, B, C, D and E). Directorate E's task was applying the Treaty provisions on taxes. This function was later transferred to another Directorate-General. The role of Directorate D was confined to the control

of State aid under both the EEC and ECSC treaties' rules. Directorate C, created after the coming into force of the Treaty on the merger of the European executives, was first charged with enforcing the competition rules of the ECSC Treaty, which included provisions on cartels, mergers and dominant positions. Its competence was later extended to the application of the competition rules contained in special Council Regulations concerning transports by land, sea and air. Neither type of sectorial rule is in force today. Most of DG Competition's workload at the time was carried out by Directorate B. Being entrusted with the application of Articles 85 and 86 of the EEC Treaty (now Articles 101 and 102 of the Treaty on the Functioning of the European Union) to all industries, this Directorate investigated, established, and sanctioned infringements of the rules concerning restrictions of competition and abuses of dominant positions. In addition, it also decided on the applications submitted by undertakings seeking to have their restrictive contracts exempted from the general ban imposed on such agreements. The enforcement of competition rules to the public sector including State monopolies (Articles 90 and 37 EEC, now Articles 106 and 37 TFEU) were reserved to Directorate A. Through its initiatives, the Commission has contributed to a large extent to open markets in this area, in particular for telecommunications and postal services.

After regulation 17, 1962

When I joined DG Competition in 1967, the Commission had just begun to develop an active competition policy, focussing on the application of the rules to undertakings.

Council Regulation 17 of 1962 had provided the legal basis for the exercise of powers in this area of law and had marked the starting point of a fast-growing field of activities. Many decisions against horizontal price, quota and market-partitioning cartels were adopted over the years since 1968. These decisions established a well-founded Commission doctrine according to which agreements between undertakings, decisions by associations of undertakings, and concerted practices of the abovementioned kind are prohibited and have no chance to be exempted. In contrast, agreements even between competitors are to be looked at favourably if they have as their object cooperation in the production of goods or services or in the research, development and production of new or improved goods and services, provided that the parties do not exceed a market share of 20% and 25 %, respectively.

The birth of Block Exemption Regulations

The treatment of vertical agreements under Article 85 (1) and (3) EEC was more difficult. Regulation 17 had created a system of prior control for almost all kinds of restrictive agreements, be they horizontal or vertical in nature. For instance, to be granted an exemption for distribution or licence contracts – the only way to ensure their validity in civil law – the undertakings had to notify them to the Commission and wait for its final decision. This procedure applied to restrictive agreements which already existed before Regulation 17 entered into force as well as to those which were concluded thereafter. Only few, narrowly defined categories of

agreements generally considered as less dangerous for competition were dispensed from prior notification. This legal system had unforeseen consequences. The Commission was overloaded by waves of notifications relating to old agreements. Until the 1st of January 1967 – the last deadline – DG Competition received about 38,000 notifications. Just about 700 of them related to horizontal agreements. Among the more than 37,000 notified vertical agreements, about 3,000 concerned sole distribution contracts and about 4,000 were licence agreements. It was clear from the outset that such a number of cases could not be dealt with by way of individual proceedings. Only group-wise exemptions as provided in Article 85 (3) EEC offered a solution for the Massenproblem created in particular by the notification of old sole-distribution and licence agreements.

The Commission responded to this obvious challenge with an innovation; it invented the Group Exemption Regulation as its own legislative instrument. In order to act as legislator, the Commission needed a specific legal basis, which it asked for and obtained from the Council in the form of specific Empowering Regulations. These defined the categories of restrictive agreements that were eligible for group exemptions as well as the procedure to be followed by the Commission. This procedure includes the publication of the draft Regulation and consultation on its content with interested parties and the competition authorities in the Member States. For the rest, the Commission is given room for discretion. It can define the Regulation's details, in particular exemption criteria. The Commission also

fixes the duration of the Regulation and decides on its renewal, modification or repeal. Within this legal frame, the first group Exemption Regulation, ('Regulation 67/67/EEC on the application of Article 85 (3) of the Treaty to certain categories of exclusive distribution agreements') was adopted. As one of the officials responsible for legislation, I have been directly involved in extending the validity of the Regulation over the next 15 years. In the 1970's and 1980's I also prepared and drafted new group exemption Regulations concerning exclusive distribution and exclusive purchasing agreements, selective distribution agreements in the motor-car sector, technology transfer (i.e. licence) agreements and franchise agreements, as well as group exemptions relating to horizontal agreements concerning specialisation of production and the joint research, development and exploitation of the results thereof. In my view, the Commission's policy of promoting the legal certainty of undertakings by the adoption of group exemptions was a great success. The use of this flexible instrument has also reduced the administrative burden which individual exemption procedures would have imposed both on industry and the Commission. I therefore welcome the maintenance of this instrument as a safe harbour for undertakings even in the current system of legal exception introduced by Council Regulation 1/2003.

Defining dominance

As a member of the unit in charge of general legal questions, I also had the opportunity to contribute to the development of the Commission's practice

of enforcing the application of Article 86 EEC (now Article 102 TFEU). This process started slowly in the late sixties before gaining more speed in the seventies and eighties. The article gave rise to difficult problems of interpretation. How should the vague notions of ‘abuse’, ‘dominant position’, and ‘substantial part’ of the internal market be understood? We proposed an extensive application which was aligned with the general aims of the Treaty. The Commission accepted our rather progressive position and enacted it in its prohibition decisions taken against United Brands (in the so-called Banana case) and Hoffmann-La Roche (in the so-called Vitamine case), thereby taking the risk that these decisions might be annulled by the Court of Justice. However, the Court confirmed the Commission's interpretation in two landmark rulings handed down in 1978 and 1979.

Continental Can, the Tobacco case and the birth of the merger regulation

Another courageous decision had already been taken in the case *Europemballage/Continental Can*, where the Commission prohibited the merger between a dominant group of undertakings and its last significant competitor. The Court of Justice in its 1973 ruling annulled the decision because the Commission had failed to give a correct definition of the relevant markets that were affected by the merger. But it confirmed the Commission's view that Article 86 EEC also applied to concentrations by which an undertaking in a dominant position by taking over its remaining competitors thereby eliminating any serious competitive pressure in the

relevant market. This ruling gave rise to the so-called ‘Continental Can doctrine’. Unfortunately, the Commission did not exploit this doctrine by taking a series of individual decisions on the same line as in the Continental Can case, thereby creating an established practice of applying Article 86 EEC to concentrations between undertakings. This could have helped to fill an obvious lacuna in the EEC Treaty which, unlike the older ECSC Treaty, did not contain provisions on merger control. Instead the Commission submitted an ambitious proposal for a Council Regulation which would have given it the power to control all mergers involving large undertakings and affecting trade between Member States. This proposal had no chance of being accepted by the Council, neither in its initial version, nor after a series of amendments submitted in the following years. In particular, the larger Member States which had just introduced merger control rules in their national competition acts were unwilling to give new powers to the Commission. The discussions in the Council did not produce any progress during 14 years. The announcements made by Commissioners Andriessen and Sutherland that the Commission would examine the possibilities of applying Article 85 EEC to mergers – a solution it had rejected in a 1965 Memorandum on the problems of concentration in the Common Market – were not taken serious by the Member States.

The attitude of national governments changed in 1987 after the Court of Justice's ruling in the so-called Tobacco case (*British American Tobacco Company Ltd. and R.J. Reynolds Industries Inc. v.*

Commission, joined cases 142 and 156/84). In that ruling, the Court stated that a company's significant investment in the capital of a competitor could fall under Article 85(1) EEC because it may lead to a coordination of the parties' commercial policies and, at a second stage, to a full take-over of a competitor by the investor. Fearing the rise of a new doctrine, Member States accepted to enter into negotiations. These took place on the basis of new Commission proposals and resulted in the adoption of the first European Merger Control Regulation (Council Regulation (EEC) 4064/89 of the Council of 21 December 1989, since replaced by Regulation (EC) No.139/2004, which maintained the the original Regulation's essential basic provisions and procedure). Both Regulations resulted from a political compromise between the larger and smaller Member States. The first group (France, Germany, Italy, Spain and the UK) wanted to limit the powers to be transferred to the EU, while the second group took the opposite view. In the absence of national merger control rules, smaller Member States considered the Commission as the best possible defender against the then-growing trend of significant industrial mergers. A reconciliation between these diverging positions was indispensable. The proposed Regulation had to be founded not only on the specific legislative powers which the Council, according to Article 87 EEC, holds in the area of competition, but also on Article 235 EEC, because it had as its object to fill a gap in the competition rules by amending the primary law of the Treaty. This means that a unanimous vote in the Council was necessary. The

'historical compromise' was finally achieved through a clear separation of the powers remaining with the Member States and those to be transferred to the EU in the area of merger control. These powers have an exclusive nature on either side. Parallel application of national and EU law are thus excluded. The competence of the Commission was confined to concentrations of community-wide relevance, expressed in turnover figures. To fall under Regulation (EEC) 4064/89, a merger must meet three criteria: a worldwide accumulated turnover of all the parties together of more than 5000 million euros and a Community-wide turnover of each of at least two parties of more than 250 million euros. However, the Regulation does not apply to such mergers where the parties make more than two thirds of their joint Community-wide turnover in one and the same Member State. In other words, the powers of the Commission are limited to the review of large mergers between undertakings that are above certain turnover thresholds which, however, must not be confined to a single Member State. The other main features of the Regulation are its system of mandatory pre-merger notification with the obligation imposed on the parties not to implement the concentration before the Commission takes a final decision and the need for the Commission to decide on the case within short legal deadlines (one month in a first phase, four additional months in the second, final phase). I consider my involvement in this big piece of legislation as one of the highlights of my career in the Commission. I was the draftsman of the Commission proposal and part of the three-strong team charged with the negotiations in the working group

of the Council. To have been successfully fighting for the introduction of a European system of merger control has given me a feeling of great personal satisfaction.

Personal

In 1990 I returned to my previous task as head of unit 'general legal questions and legislation'. I participated in the drafting of the Commission Regulations which implemented Council Regulation 1064/89 and prepared new group exemption Regulations concerning technology transfer agreements and distribution agreements in the motor-car sector. Between 1990 and 1996, I also assumed the function of coordinating the activities of other Directorates with regard to the treatment of individual cases under Articles 85 and 86 EEC. In 1997 I left my post in Directorate A and became a special adviser to the Director-General. My main role was to prepare the reform of the procedure for the application of Articles 85 and 86 EEC; laid down in Regulation 17 since 1962. Moreover, I had the pleasure to chair the Advisory Committee on Restrictive Practices and Dominant Positions. My last post was that of Hearing Officer with the rank of Director. I very

much appreciated the exercise of this function because it ensures its holder a high degree of independence. In my mind, this is necessary for a person who acts as a kind of judge over the often diverging interests of the parties on the one hand and of the DG's case handlers on the other. My last task was the preparation of a new Commission Mandate which extended the powers of the Hearing Officer in the interest of a transparent, objective and fair proceeding which fully guarantees the parties' rights of defense. I retired in 2001.

Looking back, I must confess I had a very active professional life during all of the 36 years in which I worked for the Commission while carrying out a large variety of extremely interesting tasks. I thank the Commission and in particular DG Competition for having been granted this opportunity. Also, I must underline the excellent human relations which prevailed in this Directorate General. From the beginning to the end of my career I found myself part of a large DG Competition family where each member of whatever grade or nationality helped all the others. To work in such an atmosphere for the future of Europe is a real privilege.

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