Modernisation and the new network of competition authorities

Introduction

On 1 May 2004, a brand new system of application of Articles 81 and 82 enters into force. This is the result of a long process of a reform which started five years ago and has been characterised by a large public consultation at every stage.

It all began in 1999 with the publication of a White Paper on the modernisation of the implementing rules of Articles 81 and 82 of the Treaty, suggesting a deep overhaul of Regulation No 17, which dated back to the 1960s. In 2000, taking into account the results of the public consultation on the White Paper, the Commission made a formal proposal to the Council. It was enacted two years later, under the Danish Presidency, as Regulation (EC) No 1/2003. In order to allow for a smooth transition to the new system, the date of application of the new regulation was set for 1 May 2004, while 2003 was dedicated to the drafting of, and consulting on, the flanking measures at Community level and to the required amendments of several national laws.

Objective of the reform

The objective of the reform was to ensure an efficient protection of competition in an enlarged Community. At the end of the 1990s, it became clear that the system of Regulation No 17/62, based on an administrative control of agreements and in which the Commission bore almost alone the responsibility for enforcing Community competition, would not be appropriate in an enlarged Community of 25 Member States. A new way of enforcing the rules had to be found which would maintain the traditional responsibility of the Commission for defining competition policy and apply the rules in individual cases while involving national bodies more in this process.

Role of national courts and competition authorities

The new regulation creates the conditions for a greater involvement of national courts by making Article 81 as a whole directly applicable. This implies that any undertaking or final consumer suffering from an infringement of that rule can directly take legal action against the authors of the alleged infringement before a national court and obtain damages, without having to wait for the outcome of any administrative proceeding. This will certainly contribute to a better understanding, and therefore respect, of competition rules.

As far as public enforcement is concerned, the new regulation empowers all national competition authorities to apply Articles 81 and 82 in their entirety and makes it compulsory to apply Community law whenever it is applicable, i.e. whenever the agreement or practice at stake may affect trade between Member States. In the new system, not only the Commission but also the national competition authorities will be responsible for enforcing Community competition rules.

New focus and improved legal tools

It is not, however, enough to increase the number of potential enforcers: they must also be able to focus their action on the fight against serious infringements. The Commission, for its part, proposed to the Council abolition of the authorisation and notification system at Community level because it created an unnecessary burden and distracted the authority from the detection and repression of severe violations, which were obviously never notified. This was done by Regulation (EC) No 1/2003. A number of national competition authorities have experienced the same phenomenon and are in the process of either abolishing or at least slimming down substantially their notification system. These reforms will allow the public enforcers to concentrate on the core activity, which is to detect, bring to an end and sanction infringements.
Not only do public authorities have to be able to concentrate on the essentials; they also have to be given the necessary legal tools to perform their activities efficiently. The new regulation has slightly improved the powers of investigation of the Commission, by, for example, giving it the power to affix seals during inspections in companies’ premises or to search private homes if there is a legitimate suspicion that business records are kept there.

**European competition network**

The entry into force of the system will bring about several challenges, the most important of which is to ensure a correct allocation of cases and a consistent application of the rules by all the players. As far as national courts are concerned, rules guiding the allocation of private commercial litigation are already in place. To facilitate coherent application, Regulation (EC) No 1/2003 creates a number of specific instruments such as the power for the Commission and national competition authorities to intervene as amicus curiae before courts applying Articles 81 and 82 of the Treaty. The Commission has also got involved in subsidising the training of national judges in Community competition law.

As far as public enforcement is concerned, a network of competition authorities called the European competition network (ECN) was set up at the end of 2002. It is made up of all competition authorities in charge of the application of Articles 81 and 82. It will be the framework for the intense cooperation required to ensure a correct case allocation and a consistent application of the rules. The legal instruments for the various exchanges within that network are to be found in Regulation (EC) No 1/2003: the authorities have the power to exchange confidential information, to use such information as evidence in their respective proceedings and are subject to various information obligations in their cases. The ECN is a flexible and informal network: it does not take ‘decisions’ and cannot compel its members to act in a certain way. It is, however, expected that the constructive character of the discussions will help solve most of the issues which may arise. Should a deadlock occur, the Commission retains the power to relieve national competition authorities of their competence by opening proceedings.

Since its creation, the ECN has concentrated mainly on the setting-up of the new system by discussing the modalities of the future cooperation, the content of the various implementing measures and transitional issues. The high level of commitment by its members and the openness of their discussions bode well for the effective functioning of the ECN as of 1 May 2004.

**LINK**

Modernisation