Anti-competitive practices: New powers and means to fight against cartels (EU and France)

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By intensifying enquiries and verification procedures, the new measures put in place at the EU level by the European Commission and the new procedures of the NRE law in France aim to discourage and sanction anti-competitive practices. Competition audits, compliance programmes and first aid kits have now become a necessity in light of this enforcement drive.

Competition is a key component to the goal of establishing a common market, removing trade barriers goes hand in hand with the development and enforcement of common and transparent competition rules.

In the near future – 1st May 2004 – the European Union will see two new developments that are closely linked to:

- The EU's enlargement; and
- The entry into force of Regulation 1/2003, which modernises competition rules.

Enlargement clearly represents a challenge to European competition policy. The Commission is well aware of this and expressed that view as early as 1999 in its White Paper dated 28 April 1999 on the modernisation of articles 85 and 86 of the EC Treaty[1] (now article 81 et 82 EC). With the onset of enlargement, a revision of competition rules became a necessity.

Indeed, EU enlargement requires a reinforcement of competition policy in relation to cartels and the abuse of a dominant position. In particular, the dominant position of former state monopoly companies are common in accession countries and those companies may well be tempted to abuse their dominant position in order to compensate for their lack of competitiveness. The 'planned economy' tradition also represents a potential threat in that it tends to favour agreements between "competitors". Any proposal by accession countries to reform their procedural rules in the competition arena must take into account the *"acquis communautaire"* in spite of the fact that the administrative structures in the these countries will not be familiar with concepts such as free market and free enterprise. A direct consequence of enlargement will be an increase in the number of anti-competitive agreements and abuses of dominant positions that will now be subject to Community law. With twenty Member States, maintaining an effective competition policy required a reform of the competition enforcement rules for Articles 81 and 82 of the EC Treaty.

In order to enable the European Commission, to focus its attention to its key target, cartels, which it considers to be the most serious threat to competition, the EU legislator thought it necessary to increase the decentralisation of the enforcement of competition rules towards national competition authorities of Member States.

As such, the reform embodied in Regulation 1/2003 is organised in two major parts:

- The transition from a clearance system to a system of legal exception[2]; and
- The transition from a centralised to a decentralised enforcement system.

The aim of this reform is thus to remove the heavy burden placed upon the Commission by the many notifications and exemption requests.

The Commission has already begun its internal reorganisation, by creating within the Competition Directorate General (Competition DG) a second specialised unit to combat cartels. Its purpose is to increase the number of investigations of undertakings suspected of being involved in anti-competitive practices. This new measure by the Commission adds to the first anti-cartel unit set up three years ago.

In France, since 2002, the NRE[3] law and the related enforcement rules that go with it, back up Community rules but deal essentially with national anti-competitive practices. Prior to the NRE law in 2001, the national competition directorate of investigation (the DNECCRF[4] which is a unit of the DGCCRF[5]) was set up thus completing the regional set-up which includes 8 interregional investigation brigades. Since then, the DNECCRF has processed hundreds of cases. The NRE law increases the powers of investigation of the DGCCRF to fight against anti-competitive practices, by reinforcing the

powers of its officers in order to facilitate the detection of anti-competitive practices and by giving them the power to investigate nationally.

From now on, investigators have equivalent powers to those of the administrative police, and will have access to modern IT and telecommunication technology in order to work from their offices or remotely.

Commission officials will see their powers of investigation, currently stemming from Regulation 17/62, increased with the implementation of Regulation 1/2003 on 1st May 2004. These new powers will be very similar to the powers, given to French officials under the Code of Commerce which was recently amended by the NRE law.

In addition to questionnaires that should already be familiar to undertakings, competition authorities have witnessed an increase in both their numbers and powers to initiate, generally without notice, surprise site inspections (commonly known as "dawn raids") not only on the premises of undertakings that are suspected of anti-competitive practices (price fixing, market sharing etc.) but also at the homes from 1st May 2004 of the employees of the undertakings in question.

Competition authorities now have various enforcement means they can adapt depending on the situation before them. Both at the national and Community level there are two types of site inspections.

Under the 'simple' inspections procedure, investigators can, simply by presenting a warrant, require and take copies of all documents relating to their investigation. Under this procedure, investigators cannot seize documents, however undertakings that, deliberately or negligently, provide incomplete or inaccurate information, will be liable to a fine.

While an undertaking has the theoretical right to refuse a simple site inspection, the investigators can also, with the collaboration of the Commission and DGCCRF's investigators, search the premises with a court warrant under judicial supervision with the assistance of police officers.

This type of search, commonly know as a 'heavy' investigation, has a huge impact on the individuals concerned since it is similar to a criminal investigation.

With this type of search, the investigators not only have access to all the premises of the undertaking but also to the private[6] premises of its employees and their means of transportation (ie. their cars). They can seize[7] any documents and information in any format, can seal documents and information whether professional or private (eg. agendas), a well as information contained in computers. They can demand any document, book, invoice or other professional documents and take copies of them, with the exception of privileged correspondence with lawyers. Lastly, the investigators can require oral information and justifications either on the spot or by appointment.

By way of example, at the beginning of August, the French authorities are thought to have undertaken dawn raids in the offices of the three French mobile phone operators, Orange, SFR and Bouygues Telecom. These raids supposedly followed a complaint alleging illegal agreements, on call charges between mobile phones and concerted practices between the three operators.

Hand in hand with these changes, competition authorities have taken care to refine their existing enforcement powers. As such, the method used to calculate fines imposed has, at the national level changed so that the fines that can now be imposed can be considerably higher. Authorities have not been shy to let it be known that they are using these powers either. Record fines are systematically published in press releases (by way of example on 1st October 2003 the Commission imposed fines totalling €138.4 million in the retarding agent chemical sector (Sorbates); in 2001 another famous decision was the vitamins cartel which involved €855 million fine). At the national level, the French ceiling for fines has been increased from 5% to 10% of global turnover instead of national turnover.

In addition, tipping off by undertakings involved in cartel activity is further encouraged. In this respect, the Commission has revised its 1996 communication in order to make its system of fine discount or immunity even more attractive to undertakings making disclosures (Communication dated February 2002). In a similar vein to US and European authorities, the French authorities have also established a leniency programme. The end result of these leniency programmes being a climate of fear and suspicion among cartel members.

Leniency measures have had a growing success in that they limit or indeed even extinguish the fines normally imposed on undertakings involved in anti-competitive practices.

In France, the relative novelty of these measures does not allow us to draw any conclusions yet on the way the French authorities will apply them. However, thirty undertakings would have already requested to benefit from this programme last year alone and the European experience in this regard is very telling.

By way of example, the French leniency programme contains two types of measures:

- The first type exempts undertaking either partially or completely from all financial penalties imposable for this type of conduct provided it contributes to establishing the existence of the prohibited practice and helps to identify its authors by providing new information. It is clear however that

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simple statements will not be enough and that competition authorities will require concrete evidence.

- The second type, under article L.464-2, II, of the Code of Commerce, provides that an undertaking that does not challenge the claims made against it and undertakes to modify its behaviour going forward, will see its fine reduced by half.

The Commission also considers the set-up of 'compliance programmes' by undertakings, even after the opening of an inquiry or a procedure, to be a mitigating factor which demonstrates a willingness by the undertaking to "modify its behaviour" going forward.

It should however be noted that the criteria used by competition authorities to calculate the starting point of a fine remains unclear and one has to ask oneself whether these so-called reductions are indeed real.

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With the entry into force of Regulation 1/2003 and the new enforcement procedures of the NRE law, undertakings must henceforth consider the increased risk of enquiries and dawn raids and must take appropriate measures to minimise those risks. Undertakings should consider competition audits of their market practices, the set-up of compliance programmes tailored to their needs and the distribution among staff of a 'first aid kit' in the event of a dawn raid or where a strategic decision has been taken to disclose certain non-compliant practices.

Cartels as well as other types of anti-competitive practices are now more than ever the target of competition authorities which forebodes difficult times for die hard price fixers and market sharers. ■

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[1] "THE COMING DECADE WILL PRESENT TWO MAJOR CHALLENGES FOR COMPETITION POLICY: ECONOMIC AND MONETARY UNION AND THE ENLARGEMENT OF THE COMMUNITY TO INCLUDE THE COUNTRIES OF CENTRAL AND EASTERN EUROPE AND CYPRUS." (PARA 5 OF THE 1999 WHITE PAPER)
[2] "IN AN ENLARGED COMMUNITY WITH MORE THAN TWENTY MEMBER STATES, CENTRALIZED DETECTION OF, AND ACTION AGAINST, INFRINGEMENTS OF THE COMPETITION RULES WILL BE INCREASINGLY INEFFICIENT AND INAPPROPRIATE. APPLICATION OF THE RULES WILL HAVE TO BE DECENTRALISED MORE TO THE MEMBER STATES' COMPETITION AUTHORITIES AND TO THE NATIONAL COURTS." "AT ALL EVENTS, IT IS INCONCEIVABLE THAT, IN AN ENLARGED EUROPEAN UNION, UNDERTAKINGS SHOULD HAVE TO NOTIFY, AND THE COMMISSION EXAMINE, THOUSANDS OF RESTRICTIVE PRACTICES." (PARA 46 AND 48 OF THE 1999 WHITE PAPER)
[3] NOUVELLES RÉGULATIONS ÉCONOMIQUE.
[4] DIRECTION NATIONALE D'ENQUÊTES DE CONCURRENCE, CONSOMMATION ET RÉPRESSION DES FRAUDES.
[5] DIRECTION GÉNÉRALE DE LA CONCURRENCE, DE LA CONSOMMATION ET RÉPRESSION DES FRAUDES.
[6] FROM 1ST MAY 2004 FOR THE INVESTIGATORS OF THE COMMISSION FURTHER TO REGULATION 1/2003.
[7] IBID.