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A.W. Kist*

Decentralisation of Enforcement of EC Competition Law

New Cooperation Procedures May Be Necessary

The modernisation of European competition law is a process which has already been going on for some time. On the one hand, it involves incorporating the new policy in guidelines in relation to vertical and certain horizontal agreements. On the other hand, it concerns a revision of the Regulation 17/62 on the application of Articles 81 and 82 of the EC Treaty. This operation should make the enforcement of competition law more efficient.

Both developments have consequences for the activities of the NMa (Dutch National Competition Authority). On the one hand this is because the enforcement of the Competitive Trading Act closely follows EC competition law. The guidelines on business cooperation, for instance, explicitly state that the NMa will follow the system of the guidelines for horizontal and vertical agreements of the Commission. If this is not the case, the reasons as to why not will be expressly set out.¹

On the other hand, in the modernisation operation a clear task in the field of enforcement is entrusted to the national competition authorities:

"The proposed system will result in increased enforcement of Community competition rules, as in addition to the Commission, national competition authorities and national courts will also be able to apply Articles 81 and 82 in their entirety.

National competition authorities, which have been set up in all Member States, are generally well equipped to deal with Community competition law cases. In general, they have the necessary resources and are close to the markets. [...]•

It is a core element of the Commission's proposal that the Commission and the national competition authorities should form a network and work closely together in the application of Articles 81 and 82. The

network will provide an infrastructure for mutual exchange of information, including confidential information, and assistance, thereby expanding considerably the scope for each member of the network to enforce Articles 81 and 82 effectively. The network will also ensure an efficient allocation of cases based on the principle that cases should be dealt with by the best placed authority."²

In this paper, I will discuss the consequences of the cooperation resulting from the modernisation operation for the functioning of a national competition authority. Topics such as enforcement by national courts, investigative competences of the Commission etc., will therefore be left out of consideration.

The structure is as follows. First, the proposals made by the Commission in the framework of the modernisation in order to guarantee uniformity in the application of Articles 81 and 82 EC (para. 2) will be discussed briefly. Subsequently, we will take a closer look at the exchange of information which will take place as a result of the modernisation between the various competition authorities (para. 3). The articles referred to in the text are the articles from the proposal for a Council Regulation concerning the implementation of the rules on competition laid down in Articles 81 and 82 EC, as published in the Official Journal of 19 December 2000.³

Uniform Application of Articles 81 and 82

Article 11 - Cooperation between the Commission and the competition authorities of the Member States:

"1. The Commission and the competition authorities of the Member States shall apply the Community competition rules in close cooperation. [...]

4. Where competition authorities of Member States

¹ For the text of the guidelines, see the web site of the NMa: www.nma-org.nl.

² See OJ2006>C365.

³ Ibid. .

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intend to adopt a decision under Article 81 or Article 82 of the Treaty requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption regulation, they shall first consult the Commission. For that purpose, they shall no later than one month before adopting the decision provide the Commission with a summary of the case and with copies of the most important documents drawn up in the course of their own proceedings. At the Commission's request, they shall provide it with a copy of any other document relating to the case. [...]

6. The initiation by the Commission of proceedings for the adoption of a decision under this Regulation shall relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82 of the Treaty."

An important pillar of the modernisation operation is the decentralisation of the enforcement of Articles 81 and 82 EC. If such an operation is not to jeopardise the consistent application of the competition law, enough instruments will have to be created to guarantee this uniformity.

In the regulation certain formal mechanisms are established to ensure consistent application, including a consultation procedure for certain types of decisions adopted by national competition authorities (see Article 11, para. 4). This provision requires national competition authorities to consult the Commission prior to the adoption of prohibition decisions, decisions accepting commitments and decisions withdrawing the benefit of a block exemption regulation. All such decisions have direct repercussions on the addressees. It is therefore important to ensure that these decisions are consistent with the general practice of the network. In case of substantial disagreement within the network, the Commission retains the power to withdraw a case from a national competition authority by initiating itself proceedings in the case (Article 11, para. 6).

The Commission does not consider it necessary for consistency purposes to provide for prior consultation in respect of other types of decisions adopted by national competition authorities, such as rejections of complaints and decisions to take no action. These decisions bind only the deciding authority, and do not preclude subsequent action by any other competition authority or before national courts. On the other hand, however, such decisions may imply a material assessment of Article 81 or 82 EC, for instance the conclusion that there is no appreciable effect on

competition. It seems advisable to extend the decisions that must be reported to the network to include all decisions in which a content-wise assessment is given of the application of Article 81 or 82 EC. The question is whether this should also be done one month before the decision is adopted. It is sufficient for such decisions to be notified. This can be arranged within the network and need not be laid down in the regulation.

Cooperation - General Principles

The new system of enforcement of European competition law is based on the notion that full cooperation yields more than the sum of the parts. By using the means of the various competition authorities in a more efficient way, more infringements of the competition rules can be detected and fined.

. If such a system is to function, a number of principles will have to be formulated to which all members can agree. The basis should be the *equality* of all members of this network. There should not be a pyramid in which the Commission is at the top and the work is divided among the NCAs. On the contrary, a network should be created in which all European competition authorities cooperate, one of which being the Commission. Of course, the Commission has a special role as guardian of the Treaty but for this purpose several instruments have been included in the draft regulation.

This network should therefore have both a horizontal and a vertical character. Furthermore, it is very important that it is recognised that the members continue to be independent competition authorities. Independent in the sense that they are independent of each other and that not one big European competition authority with national divisions will be created. This means that a National Competition Authority (hereinafter called NCA) continues to be responsible for dealing with cases correctly and on time, in accordance with its national law of procedure. This is also one of the important underlying facts of the system, namely that the NCAs operate - also in applying European competition law - in accordance with national rules applicable to them. This means in fact that, for instance, in Ireland the provisions of Articles 81 and 82 EC will be enforced under criminal law, as opposed to the Netherlands where enforcement will be governed by administrative law. The sanctions that may be imposed will also be determined by national law. However, a precondition in this respect is that the sanctions actually have a deterrent effect as well as a sufficiently punitive character.⁴

Case Allocation: Current System

Regulation 17/62 does not deal with the distribution of tasks between the national competition authorities and the Commission. Whether an authority can apply Articles 81 and 82 EC will depend on its national competition law. The national court can always apply Article 81(1) and Article 82 EC.⁵

The Notice on cooperation between national competition authorities of the Member States and the Commission specifies the distribution of tasks with regard to the application of Articles 81 and 82 EC.⁶ It lays down guidelines for the division of tasks. These criteria are as follows:

- the territorial scope of the effects of the agreements;
- the nature of the infringement: can an exemption be granted or not;
- cases of particular significance to the Community, such as a new legal problem or a case that is important because of the economic weight of the parties involved, will be handled by the Commission'

Pursuant to the Notice, the competition authorities of the Member States can deal with complaints at the request of the Commission. If the Commission considers that the above criteria are met, it will ask the relevant competition authority of the Member State where the consequences of the challenged agreement or the actual practice are deemed mainly to occur, whether it agrees to investigate the complaint and to take a decision on the matter. If the answer is affirmative, the Commission will reject the complaint pending before it on the ground that it does not display sufficient Community interest, in which respect reference is made to the fact that the same case has been brought before the national competition authority, either automatically or at the complainant's request. The Commission will provide the relevant information in its possession to the authority.

Concerning the current cooperation, the Commission states the following in its White Paper:⁷ "Cooperation between the Commission and the national competition authorities has hitherto been on a pragmatic footing, and has been limited by the Commission's exclusive right to apply Article 81(3)."

So, this means that there is no actual cooperation which would result in the total yielding more than the sum of the parts.

Regulation 17: The New Text

Article 11 - Cooperation between the Commission and the competition authorities of the Member States:

"1. The Commission and the competition authorities of the Member States shall apply the Community competition rules in close cooperation.

2. The Commission shall forthwith transmit to the competition authorities of the Member States copies of the most important documents it has collected with a view to applying Articles 7 to 10.

3. Where a matter involving the application of Article 81 or Article 82 of the Treaty is referred to the competition authorities of the Member States or where they act on their own initiative to apply those Articles, they shall inform the Commission accordingly at the outset of their own proceedings.

4. Where competition authorities of Member States intend to adopt a decision under Article 81 or Article 82 of the Treaty requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption regulation, they shall first consult the Commission. For that purpose, they shall no later than one month before adopting the decision provide the Commission with a summary of the case and with copies of the most important documents drawn up in the course of their own proceedings. At the Commission's request, they shall provide it with a copy of any other document relating to the case.

5. The competition authorities of the Member States may consult the Commission on any other case involving the application of Community law.

6. The initiation by the Commission of proceedings for the adoption of a decision under this Regulation shall relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82 of the Treaty."

Article 13 - Suspension or termination of proceedings:

"1. Where competition authorities of two or more Member States have received a complaint or are acting on their own initiative under Article 81 or Article 82 of the Treaty against the same agreement, decision of an association or practice, the fact that one authority is dealing with the case shall be sufficient

⁴ Pursuant to Article 10 EC Treaty.

⁵ Case 127/73, BRT/Sabam, ECR 1974, 51.

⁶ OJ1997, C313.

⁷ COM (1999) 101 Final, OJ 1999, C 132/1.

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grounds for the others to suspend the proceedings before them or to reject the complaint. The Commission may likewise reject a complaint on the ground that the competition authority of a Member State is dealing with the case.

2. Where the competition authority of a Member State or the Commission has received a complaint against an agreement, decision of an association or practice which has already been dealt with by another competition authority, it may reject it."

To achieve one of the objectives of the modernisation operation - more efficient use of means to enforce Articles 81 and 82 EC - agreements should be made within the network about the distribution of the work. An authority should be set up that divides this work.

The starting-point is that the complainant determines which competition authority will deal with the case. Depending on the law of procedure of the Member State, the competition authority will or will not have to take a decision in the end. If the NCA arrives at the conclusion that a case does involve an appreciable impact on trade between Member States, the result of the system of the draft regulation is that European law has to be applied (Article 3).

The thought behind the cooperation is that these cases are made known to the network. Article 11, para. 3, only speaks of informing the Commission, but this should be seen in a broader perspective; such cases should be notified to the network. In this way, not only the Commission but also the other competition authorities can see that a certain case is being dealt with and they can inform the authority handling it that they wish to play a role in the case, for instance because it also involves their territory. The modernisation operation will overshoot its mark if the competition authorities then start handling the case jointly. The principle should therefore be that one authority deals with the case. To this end, Article 13 lays down the legal basis for rejecting or suspending the case. However, the result of the fact that the competition authorities remain independent is that an authority cannot be forced to stop a case. In such exceptional cases it should be possible for them to deal with the case jointly.

A structure as described above means that the risk of forum shopping, which is sometimes referred to as a danger of the modernisation operation, ceases to exist. It is indeed not up to the complainant to determine which authority should deal with the case. The distribution of cases will be done within the

network. If such a system is to function, it is important that there should be clarity which competition authority will be handling the case. This will make clear to undertakings where they should lodge their complaint. It is of course not the intention that the decision as to which authority should handle a case becomes a decision open to appeal. At that moment the main objective of the modernisation operation would be at risk.

Within the network, criteria should therefore be formulated on the basis of which cases are distributed. In this respect inspiration may be drawn from the above-mentioned Notice on cooperation between national competition authorities of the Member States and the Commission. This obviously does not apply to those criteria arising from the current exclusive right of the Commission to grant exemption. Other criteria mentioned can however indeed be used.

The main criterion should, in my opinion, be that the case should be dealt with by the authority on whose territory its effects make themselves felt most strongly. In most cases the main effect of a case will occur in one Member State. It will then be clear which competition authority should handle the case. One could imagine cases in which this is not so clear, for instance in the case of an agreement between a German and a Dutch undertaking which has the same effects on German and Dutch territory. Here, there may be three solutions. The first one is that, following consultation, one competition authority withdraws. The other extreme is that the Commission deals with the case. Finally, an intermediate form is that the two competition authorities deal with the case jointly. As already stated above, the latter is not an advisable option. If the relevant geographic market covers several Member States or even the entire EU, the Commission will be the most appropriate competition authority to deal with the case. This applies to cases of particular significance to the Community, such as a new legal problem. It is difficult to think of other criteria on the basis of which cases can be divided.

Exchange of Information

Exchange of information by the Commission and national authorities: Under the current system, Article 20 of Regulation 17 stipulates that pursuant to the Regulation information acquired may only be used for the purpose of the relevant request or investigation. The same applies by analogy to information acquired as a result of a notification procedure.⁸ The restriction

of Article 20 applies both to the Commission and to the national authorities that receive the information from or through the Commission. Therefore, information acquired pursuant to Regulation 17 may not be used in procedures to which this Regulation does not apply. The information may however be used as "indications" which may be taken into account in order to justify instituting national procedures.⁹ Article 20 does not preclude that a national authority uses the information to apply Articles 81 and 82 in combination with the national rules of procedure, since in that case the information is used for the purpose for which it was requested. This rule protects undertakings against so-called "fishing expeditions", i.e. inspections which are conducted without the fair presumption that the competition rules are infringed upon.

Exchange of information between national authorities: The possibility of exchange of information between national authorities depends on national legislation and varies from one state to the next. Under the OECD Recommendation concerning cooperation between member countries on anti-competitive practices affecting international trade, Member States should cooperate in developing or applying mutually satisfactory and beneficial measures for dealing with anti-competitive practices in international trade. In this connection, they should supply each other with such relevant information on anti-competitive practices as their legitimate interests permit them to disclose. They should allow, subject to appropriate safeguards, including those relating to confidentiality, the disclosure of information to the competent authorities of member countries by the other parties concerned, whether accomplished unilaterally or in the context of bilateral or multilateral understandings, unless such cooperation of disclosure would be contrary to significant national interests.

Exchange of information under the Competitive Trading Act: A provision similar to Article 20 of Regulation 17 has also been included in the Competitive Trading Act (Mw). Pursuant to Article 90 Mw¹⁰ data or information on an undertaking which in connection with any activity for the purpose of the implementation of this Act has been acquired may

only be used for the application of this Act. Under Article 91 Mw and in derogation of Article 90 Mw, the Director-General is authorised to provide data or information acquired in the discharge of his/her duties under this Act and under further detailed conditions, to a foreign institution or administrative body. Such information may only be supplied to (i) a foreign institution which pursuant to national statutory regulations is in charge of applying competition rules, or (ii) to an administrative body which pursuant to a statutory regulation other than the law has been entrusted with tasks that concern the application, or also concern, the application of provisions on competition. The data or information may only be supplied if the confidentiality of the data or information is sufficiently safeguarded and if it is sufficiently guaranteed that the data or information will not be used for a purpose other than that for which it is supplied. In verifying this, the Director-General will have to consider not only the statutory provisions on confidentiality and use of data in the country concerned but also their application in practice.

The effect of the distribution of work is that in certain cases the authority before which the case is brought is not the one which will ultimately deal with the case. A question that springs to mind in this context is how to deal with the information that has already been collected and/or acquired from the complainant. Article 12 contains a provision for this.

Article 12 - Exchange of information:

"1. Notwithstanding any national provision to the contrary, the Commission and the competition authorities of the Member States may provide one another with and use in evidence any matter of fact or of law, including confidential information.

2. Information provided under paragraph 1 may be used only for the purpose of applying Community competition law. Only financial penalties may be imposed on the basis of information provided."

This Article shows that exchange of information is possible but that the competition authorities are not obliged to exchange information. For a proper functioning, of the network it is essential that the transfer of information which is a logical consequence of case allocation should be regulated. Art. 12 provides a basis for the exchange of information but should certainly be extended as a result of the practical questions that will arise.

For instance, what should be done if information is acquired in the context of a leniency programme of a

⁸ Court of Justice of the EC, Case C-67/91, Spanish Banks Case, ECR1992, I-4785.

⁹ Ibid.

¹⁰ Article 90: Information or data concerning an undertaking, obtained in the course of any activity for the implementation of this Act, may be used solely for the purpose of the application of this Act.

competition authority? Not every Member State has a leniency programme. For instance, the NMA is busy establishing one. Setting up a national programme is only useful if those who want to make use of it can be sure that they will not be punished pursuant to this programme. On the basis of the principles of the network a dossier can be transferred to another NCA because, judging by the allocation criteria, the latter is the more appropriate authority. If this competition authority does not have a leniency programme or a similar arrangement, the consequences for the undertaking concerned will be major, because where one competition authority will grant a (major) reduction of a fine, this will not be the case with the investigating competition authority. The result of this danger will be that a national leniency programme will not work, which is at odds with the principles of the modernisation operation. Therefore, a scheme will have to be developed in which the rights of an undertaking as regards the use of a leniency programme will be safeguarded.

Another question is whether the parties concerned can raise objections to the fact that information acquired from the complainant is transferred. The answer seems to be no. However, a precondition is that the information which has been accepted as being industrially confidential at one competition authority, is also recognised as such by the investigating competition authority. For the proper functioning of the network the concept of industrially

confidential information, and consequently the scope of information which is not disclosed to third parties, should be regulated at EC level.

There is also the question of whether information acquired, by conducting an inspection for another competition authority can simply be transferred. A complicating factor in this respect may be that the inspection competences differ per Member State.

Conclusion

As a result of the new Regulation 17, cooperation between competition authorities will become very intensive. The advantages of this development are that enforcement will be more efficient. On the other hand, this offers competition authorities the possibility to learn from each other, seeing that they are all working in the same field. The system of the new Regulation offers a framework for this cooperation but is by no means sufficient. The very limited points discussed in this paper already show that procedures need to be developed which regulate the distribution of work between the different authorities. In addition, the exchange of information should be organised carefully. If this does not happen, the foundations of the cooperation will be very weak. Furthermore, in this connection, a uniform level should be determined for the information which is considered as confidential and is not disclosed to third parties. This means that there is still a great deal to be regulated where the operation of the network is concerned.

Phedon Nicolaides"

Development of a System for Decentralised Enforcement of EC Competition Policy

A mini revolution is brewing in the field of competition policy. This policy, which has remained virtually unchanged since the inception of the European Community, is now being modernised and decentralised. The proposed new Regulation¹ for the application of Articles 81 & 82 of the Treaty, in

replacement of the old Regulation 17/62, is significant for several reasons:

- for the first time in the history of the EC, it empowers national authorities, including national courts, to apply the anti-trust exemption (Article 81(3)) together with the prohibitions (Articles 81(1) & 82);

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