



Competition Law Forum



Supplemental submission to the European Competition Network regarding the Modernisation Package

Introduction

The Competition Law Forum and its Modernisation Expert Group¹ offer the following comments on the 'Modernisation Package'. These comments supplement our previous submission to members of the European Competition Network of 19 August, 2003, entitled "Cooperation within the European Competition Network", formally submitted to the Commission on 6 October, 2003.

In general, our supplemental comments are related to a single theme: How will ECN members ensure that the Modernisation Package is implemented in a way which allows it to achieve its stated goal of 'an efficient division of work and an effective and consistent application of EC competition rules' within the system of parallel competences?

In relation to this theme, our comments are based on two observations:

1. **in the context of existing laws and procedures, certain aspects of the Modernisation Package make it likely that competition law enforcement after 1 May, 2004 will be *less effective* than what exists *at present*.** For example, we are particularly concerned that this will be the case when case allocation rules are implemented in a system where substantive laws and procedures of Member States relating to leniency applications differ so widely; and
2. **given the existing level of experience with the interpretation of Articles 81 and 82, certain aspects of the Modernisation Package may make it likely that competition law decision-making after 1 May, 2004 will be *less consistent* (and therefore *less effective*) than what is *intended*.** For example, we are concerned that national judges are not being provided with sufficient support in order to be able to undertake the tasks expected of them.

In our view, these issues go beyond the type of uncertainty that might be usually be expected in the short term as a result of any change in regulation. Our comments below are directed at explaining why further guidance is still required from the Commission and other ECN members and what guidance, in particular, might be most helpful.

¹ The *Competition Law Forum* is comprised of leading practitioners, economists, representatives of industry, consumer groups, regulators and academics, selected on the basis of their contribution to the area of competition law and policy. For further information, please see www.competitionlawforum.org or contact its Director, Dr Philip Marsden, at p.marsden@biicl.org or (ph.) 44 207 862 5151. The Members of the *Modernisation Expert Group* are Oliver Bretz, Clifford Chance; Mark Clough, QC, Ashurst Morris Crisp; Tim Cowen, BT; Richard Eccles, Bird & Bird; Stephen Kon, SJ Berwin; Peter Carlo Lehrell, FIPRA; Paul Lomas, Freshfield Bruckhaus Deringer; Margaret Moore, Travers Smith Braithwaite; Frances Murphy, Mayer Brown Rowe & Mawe; Stephen Walzer, BAT; Stephen Wisking, Herbert Smith; and Philip Marsden, Competition Law Forum. This submission is not attributable to any individual member or consultative member of the CLF or to their organisations.

1. Areas where flexibility is appropriate *ex ante* but greater guidance is still required to ensure that competition law enforcement after 1 May, 2004 is not *less effective* than what exists *at present*

Cooperation within the ECN; case allocation and leniency

With respect to cooperation among members of the ECN in relation to case allocation, we appreciate that as much detail has been inserted into the Modernisation Package as has been possible to negotiate amongst such a diverse group of authorities. We also appreciate that in this area, the overall ethos of equality, the close connections and the repeated interactions amongst ECN members may well ensure that where problems arise, improvements may be made relatively informally and quickly. In particular, we expect that after a problem has arisen and been resolved, the case allocation system itself can be amended relatively quickly to ensure that any similar problems are not able to arise in the future. As a result, we have heard the view that the proposed system is adequate to the task set for it, and that a 'wait and see' attitude is appropriate before further rulemaking is required.

Nevertheless, in our previous submission we noted that 'some problems can already be identified which would benefit from further guidance, even at this relatively early stage' particularly with respect to issues relating to case allocation, leniency applications and the exchange and use of information within the ECN. We therefore made some suggestions 'with a view to helping the ECN to clarify a few more details about the kind and degree of cooperation that is expected of ECN members and to provide for a set of principles to *induce* that cooperation'.² Without repeating them here, we commend these suggestions to you once more and welcome a discussion with ECN members about them.

We also welcome the opportunity to make the following supplemental observations and suggestions:

Observations

At present, there are few competition authorities in Europe – including the European Commission – that can both fine private undertakings for a breach of Article 81 and offer undertakings a degree of immunity from such fines if they offer information leading to the detection and successful investigation of a cartel (i.e., 'whistle blowing'). Of course, the Modernisation Package alters the first part of this equation considerably. All ECN members will be entitled to fine undertakings for violations of Article 81. However, only those few authorities with existing leniency programmes will be able to offer immunity from fines: at present 9 national authorities plus the European Commission out of 26 enforcement bodies. Furthermore, these authorities have different procedures for assessing applications for leniency. Such gaps and differences among the various national regimes mean that undertakings will have less certainty about whether their application for complete immunity will be accepted, or (perhaps as important) about where they will end up 'in the queue' for complete or partial immunity.

In particular, we note that leniency applications will be deterred if there is *any* possibility of an undertaking facing investigation or prosecution by an ECN member lacking a leniency programme, on the basis of information that the undertaking provided to another ECN member with a leniency programme. We acknowledge that the draft *Notice on Cooperation within the Network of Competition Authorities* (para 39) is intended to address this issue, but we still have residual concerns. Added complexity and uncertainty exists because the network contains authorities which operate a criminal law based procedure. It is not clear how the rights of undertakings will be protected under such a diverse range of enforcement approaches. As a

² Emphasis added.

result, the present gaps and differences among the regimes mean that with the coming of 1 May, 2004, a serious disincentive to whistle blowing will be created which will lead to less effective enforcement of competition law in Europe

Of course, it is stated that where a matter involves (or potentially involves) more than three Member States, the Commission will be 'particularly well placed' to act.³ As such, the subset of cases where uncertainty about leniency applications can be expected to arise may be relatively small. Nevertheless where a matter may be relevant to a market not covered by a leniency programme, or where jurisdictions differ in their approaches to leniency, uncertainty as to an undertaking's legal position will exist. This may well be the case, for example, when a cartel is unravelling but its geographic extent is not clear.

It is also a fact that most Member States will be considering introducing leniency programmes over the next few years. However, until all of them offer a broadly similar programme, the effective enforcement of European competition law is likely to be hindered. Furthermore, there is no express requirement that future leniency programmes conform to existing regimes, or indeed that existing regimes conform to some common standard. Where leniency programmes remain divergent, whistle-blowing may be impeded or deterred, with a concomitant reduction in the effectiveness of enforcement. Where whistle blowing is not deterred, an inordinate number of applications for leniency may still be directed to the Commission, particularly where the geographic extent of a cartel is not readily identifiable. If this results in a backlog of applications, the effective enforcement of competition rules may also be reduced.

Suggestions

The answer to the above problem is not to limit the ability of ECN members who can enforce Article 81 to those with broadly consistent leniency programmes. The answer is to provide some system to induce the adoption of broadly consistent leniency programmes.

Our previous submission suggested, *inter alia*, that 'ECN members continue to strive for a harmonised leniency policy in Europe, ideally through the implementation of a Directive or Regulation'. We reiterate this suggestion now. However, we also offer the following supplemental suggestions:

- **Common elements / 'best practices'** ECN members should work together to identify the core common elements of successful existing leniency programmes, and seek agreement from all members that they will follow such 'best practices' in the development and application of their own regimes. We also support the initiatives that the ECN members with leniency programmes are engaging in to explain and display to their ECN colleagues the benefits to enforcement of an effective leniency programme.
- **One 'first contact' rule** Within the first year of the new regime, ECN members should identify and adopt a uniform approach with respect to the criteria constituting a 'first contact' with any authority operating a leniency programme. Members should agree that where an undertaking's first contact satisfies those criteria, its primary place 'in the queue' should be guaranteed throughout the Community.

³ Though see our discussion of this in our previous submission, in particular our observation that 'there is no legal obligation upon the European Commission to take such a case.' Indeed, the possibility that the Commission may not open its own proceedings following a leniency application will be one of the reasons why the draft *Notice on Cooperation within the Network of Competition Authorities* (para 38) notes that '[a]n application for leniency to a given authority is not to be considered as an application for leniency to any other authority' and that therefore 'parties will need to consider whether it would be appropriate to file leniency applications with the relevant authorities simultaneously'.

- **Commission as ‘central node’ on the network** Until a harmonised leniency policy or uniform approach to first contact is introduced, we reiterate our previous suggestions that
 - ‘the European Commission should be the central recipient and coordinator within the ECN of all applications for leniency being requested in any Member State with respect to a breach of EC competition rules’;
 - in the alternative, ‘any ECN member that operates a leniency policy with respect to an affected Member State may receive an application for leniency on behalf of other ECN members’ (including those without a leniency programme) ... ‘where the application for leniency specifies the Member States with respect to which the application is made’ or the undertaking concerned has expressly consented to the ‘sharing’ of its application for leniency to the authorities in named Member States;

and we make the following further suggestions:

- Greater resources should be provided to the Commission to fulfill its role as central recipient and coordinator of leniency applications. Failure to provide sufficient resources to the Commission will result in a backlog of leniency applications being created, until such time as they can be cleared by the Commission or transferred through to national authorities. Indeed, such resources may already be needed, as uncertainty with respect to the geographic extent of a cartel may result in more applications for leniency being made to the Commission than it can cope with readily.
 - The Commission should be the primary recipient for leniency applications involving Member States which do not operate a leniency programme, whether or not more than three Member States may be involved.
 - If a leniency application is made to the Commission, and it is subsequently determined that the relevant locus of the matter is in a Member State where the national authority does not operate a leniency programme, the Commission should not relinquish jurisdiction over the proceeding. The prospect that information or jurisdiction would be transferred to a national authority in such a case would effectively deter leniency applications.
- **Guidelines on process** Following consultation with ECN members, the Commission should supplement paras 37-42 of the existing draft *Cooperation Notice* by issuing a specific Leniency Notice containing guidelines which set out precise procedures regarding:
 - how leniency applications will be assessed within the ECN;
 - how, when, and to which ECN members leniency applications may be shared, including the position of ECN members without leniency programmes and
 - how ECN members will exchange and use information with authorities operating criminal law systems, and how the rights of undertakings will be protected in such situations.
 - **Professional secrecy, privilege and freedom of information** Differing standards of protection of information throughout the Community will operate to impede effective law

enforcement by ensuring a process in which undertakings aim to provide the least amount of information to any one authority. The possibility of applications by private litigants for access to documents will deter whistle-blowing. An approach that provides similar standards of protection, and clear and consistent rules regarding the sharing of protected and non-protected information, is preferable both from an enforcement and a privacy perspective. ECN members should therefore work towards developing a harmonised approach to professional secrecy, legal privilege, and 'freedom of information' procedures.

2. Areas where less flexibility is appropriate *ex ante* and much more guidance/assistance is required to ensure that competition law decision making after 1 May, 2004 is not *less consistent* (and therefore less effective) than what is *intended*

Observations

There are aspects of the Modernisation Package where close cooperation has not yet had time to develop, or where it is impeded by significant differences in national procedures and laws. In particular, with respect to cooperation between the Commission and national courts, we do not believe that it is appropriate to 'wait and see' whether and what improvements need to be made. In this area, both the cooperation 'ethos' and the necessary mechanisms to implement it are less developed than they are in relation to discussions amongst competition authorities themselves. As of 1 May, 2004 there will be multiple interpreters of European competition law in the national judiciary all with differing levels of experience with EU law. Indeed, many national judges will become exposed to a vast area of jurisprudence about which they will have had little (and some, no) experience.

As a result, where problems or divergent decisions arise, there is a high likelihood that such issues will have to be resolved by the European courts, the CFI and ECJ. Indeed, following 1 May, 2004 it is likely that a large portion of the institutional backlog of cases and issues that currently plagues the European Commission will be transferred to the European courts (albeit in different form) with the prospect of further delay, greater intervening uncertainty with respect to the state of the law, and as a result less effective, less consistent and less efficient enforcement of European competition law. Furthermore, where such cases and questions do not get put to the European judiciary, inconsistent decisions that arise will not be corrected without intervention by the Commission, or on appeal. There is a significant likelihood that jurisprudence will develop containing substantial inconsistencies.

Suggestions

To try to help minimise these problems and better ensure the effective, consistent and efficient enforcement of Articles 81 and 82, we offer the following suggestions:

- **Increased judicial training** The Commission and other bodies are engaged in training national judges on the basic elements of European competition law. Some national judges will already be familiar with various rules and jurisprudence. The Modernisation Package and other areas of the Treaties remind national judges of their obligation to ensure that their decisions accord with the *acquis communautaire* and provide mechanisms, including cooperation with the Commission, to assist in this regard. However, we do not believe that these training processes, obligations and mechanisms will suffice to prevent an undue number of references being made to the European courts, or inconsistent decisions being made at the national level. Nor do we believe that these references and inconsistent

decisions will be able to be 'cleared' through the system quickly enough so as not to impair the consistent application of European competition rules. As such, we suggest that:

- the programmes and budgets for training judges should be significantly increased;
 - in such training programmes, particular emphasis should be placed on more substantive areas of case law than exists at present, as well as on the procedures set out in the Modernisation Package for cooperation with the Commission;
 - in such training programmes, the attention of national judges should be drawn to the fact that the *Guidelines on the Application of Article 81(3) of the Treaty* display an increased focus on economic analysis with respect to the application of both Articles 81(1) and 81(3), and that previous case law should be read in light of this development. In addition, while we appreciate that the Commission has begun work on a draft Notice on the Application of Article 82, national judges should be made aware that economic analysis is increasingly relevant to the application of this article, and that previous case law should also be read in light of this development; and
 - national judges should be encouraged to offer as comprehensive reasoning as possible in their decisions relating to Articles 81 and 82, so that the consistency of their decisions with European case law can be readily assessed.
- **Improved/consolidated online information sources** With respect to the interpretation of Articles 81 and 82, and in particular Article 81(3), the Commission should introduce and fund a consolidated on-line system of regulations, block exemptions and, in particular, relevant jurisprudence, as already exists for the *Human Rights Act* in the UK.
 - **Improved guidance on Commission/court cooperation** The Commission should introduce more clear guidance with respect to cooperation with the national courts to minimise any delays, in particular under Article 15 of Regulation 1/2003:
 - For example, the period of one month for the Commission to provide information to a national court (subject to delays for contacting affected parties/clarification with that court) should be able to be shortened upon request from the national court, particularly in injunction proceedings.
 - With respect to the provision of opinions, the period of four months allowed at present should be shortened to two months, particularly where such opinions are not legally binding and will not take the parties' views into account.
 - Further procedures should be instituted to ensure that confidential information and business secrets disclosed by the Commission to a national court remain protected from disclosure.
 - **Contact with parties** The Commission's opinion would be of greater value if it was able to submit written questions to the parties within the existing timetable. While one or more of the parties in a particular matter may have informed the Commission about the case, the Commission may be reluctant to submit such 'own initiative' observations without that ability.
 - **References** The Commission should work with the national competition authorities and national courts/ministries of justice to clarify (and if necessary narrow) the scope for an undue number of references to be made to the ECJ/CFI in competition cases, and in particular to reduce the ability of national judges to request preliminary rulings on aspects of cases involving complex mixed questions of fact and law.

- Harmonised rules regarding *amicus curiae* applications**

At present, national rules regarding the involvement of *amicus curiae* differ considerably, with courts of some Member States not allowing such involvement at all. A harmonised approach should be encouraged for competition cases to ensure the effective participation of the Commission and other authorities in proceedings. Indeed, with respect to the Commission's participation as *amicus curiae*, one would expect an obligation on the part of national courts in that regard to exist through the general duty of cooperation on all national courts (article 3 of the original Notice on cooperation between national courts and the Commission) with which a majority of national judges will be familiar. Nevertheless, we urge the Commission, national competition authorities and national courts/ministries of justice to work together to agree on a model procedure for Commission and national authority involvement in national proceedings.

Article 81 (3)

Finally, our Group commends the Commission on its *Draft Notice Guidelines on the Application of Article 81(3) of the Treaty*. The Guidelines provide far more guidance than exists at present in other notices and Block Exemptions. We welcome this, and in particular the emphasis on consumer welfare displayed in the Guidelines. We expect that they will help ECN members and courts considerably in their application of both Articles 81(1) and 81(3). We also note that despite the level of detail in the Guidelines, existing Block Exemptions will and should continue to play an important role. We offer the following suggestions:

- Given the level of detail in the Guidelines, and the relevance they will have generally, we expect that the Commission is giving due consideration to the need to provide further guidance about the future role of Block Exemptions. We support this initiative.
- We encourage the Commission to identify more clearly the specific timeframe within which the criteria with respect to Article 81(3) set out in the Guidelines will be applied.
- We note that despite the relevance of much of the Guidelines to the application of Article 81(1), more specific guidance on the application of this Article would be welcome.
- We feel that it would be helpful if future (and revised) Block Exemptions could also contain guidance with respect to the circumstances in which the types of agreement covered by the Block Exemptions do not fall within Article 81(1), as well as those in which they do.
- We welcome the initiative of the Commission in beginning work on a draft Notice on the Application of Article 82, and look forward to participating in early consultations on this draft Notice.