



Competition Law Forum



Cooperation within the European Competition Network

Introduction

The following suggestions are submitted by the Competition Law Forum (CLF)¹ to the members of the European Competition Network (ECN) in order to help ensure 'an efficient division of work and an effective and consistent application of EC competition rules' within the system of parallel competences in which the ECN members apply Articles 81 and 82 of the EC Treaty. In particular, our suggestions relate to matters falling under Articles 11 (case allocation) and 12 (exchange and use of confidential information) of the Council Regulation, and the accompanying *Notice on Cooperation within the Network of Competition Authorities*.

¹ The British Institute of International and Comparative Law launched the Competition Law Forum in January 2003, with the aim of facilitating discussion and recommendations on the most pressing competition law issues. The 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.

Following the CLF's 2nd meeting on 19 June, 2003 on 'Modernisation - Ensuring Consistency, Avoiding Conflict', a group of interested CLF members formed a smaller 'Modernisation Expert Group' to review developments in the area, and prepare suggestions for the CLF to make to the ECN in order to help implement an efficient, effective and consistent approach.

The Members of the Modernisation Expert Group are Mark Clough, QC, Ashurst Morris Crisp; Tim Cowen, BT; Richard Eccles, Bird & Bird; James Irvine, Howrey Simon; 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. Further papers on other topics will be submitted by the CLF to the ECN over the coming months, and the Modernisation Expert Group in particular looks forward to an opportunity to engage ECN members in a discussion of these suggestions.

1. Case Allocation within the Network

In operating a system of parallel competences with respect to the application of Articles 81 and 82, all ECN members retain authority over all matters affecting competition within their jurisdiction. The CLF welcomes the fact that cooperation among ECN members is intended to place take place on the basis of equality, respect and solidarity. ECN members should be encouraged to work together on this basis in order to ensure that competition is maintained, and consumer welfare thereby maximised, through the effective enforcement of EC competition rules throughout the Community.

The CLF does not underestimate the task that ECN members have set themselves. We note that the ECN is to be comprised of 26 authorities; a significant number of whom will find themselves enforcing EC law for the first time, and cooperating for this purpose with one another in a totally new manner. The CLF recognises that to ensure the efficient division of work within the network and the effective and consistent application of EC competition rules, ECN members need to coordinate their activities, and to stipulate how and when they should do so. The CLF welcomes the proposals for notices that members of the ECN have indicated that they intend to adopt in this regard. The CLF also understands that a minimalist approach to coordination appears to have been selected, perhaps in order to maximise flexibility within the ECN with respect to disagreements and problems that may arise during the early years of the network. Nevertheless, the CLF is of the view that some problems can already be identified which would benefit from further guidance, even at this relatively early stage. This is particularly true with respect to issues relating to case allocation, leniency applications and the exchange and use of information within the network. The following suggestions of the CLF are therefore made 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.

1.1 Coordination Units and Training

The system of parallel competences and the operation of case allocation rules within the ECN is going to require – and indeed depends on – an increase in the degree of communication, coordination and cooperation among ECN Members. The CLF therefore warmly welcomes the formation of an ECN coordination unit at the European Commission, and suggests that

- **each national competition authority (NCA) should expressly provide for an ECN coordination unit within its own organisation;** *(Such units may already exist in some ECN members and may be in the process of being set up at others. The CLF welcomes*

these developments and underscores the fundamental need for each ECN member to have a coordination unit and that such be budgeted for, adequately staffed and indeed actively supported by case handlers and senior officials.)

- **there should be direct training of individual case handlers at all ECN members with respect to the various case allocation criteria and their responsibilities more generally within the ECN;** *(Such training would help overcome any bureaucratic inertia or resistance that may exist within some authorities that might otherwise impede the efficient implementation of a new, decentralised enforcement system that will require officials to think about the effects of their enforcement action - and indeed interact with competition officials - beyond their borders to a greater extent than they will have had to in the past.)*
- **ECN members should have regular and frequent teleconference or videoconference calls to discuss issues of case allocation;** *(Such would allow the ECN members to monitor developments, discuss and resolve differences of opinion and make decisions efficiently and rapidly.)*
- **to facilitate cooperation within the ECN, all efforts to agree an official language with respect to case notifications and discussions within the ECN should be supported; until such an official language is agreed, ECN members should set an abbreviated time period within which each case will have an official language assigned to it.**

1.2 Case Allocation rules

To minimise any duplication or delay of enforcement activities that may result from the operation of a system of parallel competences, case allocation rules are being agreed by ECN members in order to ensure that particular competition problems are only addressed by the authority (or authorities) that are 'well placed' to do so.

Such rules, along with the requirement that each ECN member inform the network as soon as it opens an investigation², are absolutely essential for the efficient, effective and consistent enforcement of the EC competition rules. Generally speaking, the rules on case allocation would

² Article 11 (3) of the Council Regulation. So too is it important that ECN members have agreed to inform the network when they reject a complaint or terminate investigations on all cases which have been notified within the ECN pursuant to Article 11 (2) and 11 (3) of the Regulation (*Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities*, Brussels, 10 December 2002), para 24. The CLF suggests that an explanation of the decision to reject a complaint or terminate an investigation would also help ensure consistency of decision-making. In addition, the CLF encourages ECN members to maintain a database of all such decisions to initiate, reject and terminate investigations in order to help ECN members to monitor and thereby ensure consistency in the application of EC competition rules.

appear to have the aim and effect of ensuring that only one ECN member will deal with a particular case. The CLF considers this to be a very sensible approach. The following points address issues that relate to situations where:

- one NCA is 'well placed' to act
- the European Commission is 'particularly well-placed' to act, and
- more than one NCA is 'well placed' to act.

1.2.1 One NCA well placed to act

The CLF agrees that one NCA will be 'well placed' to act in situations where only one Member State is involved. This may be because an agreement or practice is implemented, originates or has its substantial direct actual or foreseeable effects on competition in that NCA's jurisdiction; that NCA is able to effectively bring to an end the entire infringement; and that NCA can gather, possibly with the assistance of the other authorities, the evidence required to prove the infringement. In the first instance, the CLF suggests that the greatest number of jurisdictional disputes will relate to the question of whether an agreement or practice has 'substantial' effects on competition in an NCA's jurisdiction. Therefore, the CLF suggests that

- **ECN members should clarify and agree a common approach on what is meant by 'substantial' effects on competition in an NCA's jurisdiction.** *(For example, should this mean that any appreciable effect on competition in a substantial part (albeit not the whole) of a Member State is sufficient? Is substantiality to be assessed in the context of the Member State's national territory or in an EC context? What happens if an agreement or practice originates or is implemented in one Member State but has substantial effects in another? What if there are substantial effects in more than one jurisdiction? Is there a need for a 'centre of gravity' test for effects, and how would such a test mesh with the practical reality that in many cases the NCA responsible for the jurisdiction from which the practice originates will be best placed to address it?)*

The CLF has considered the example of a situation where an agreement or practice implemented in and having substantial effects on competition in one Member State may also have incidental or less substantial effects in another Member State. In such a case, the NCA may be well placed to end the entire infringement and thereby maintain competition in more than one Member State. If so, the CLF suggests that:

- **in accordance with ECN members' stated intention that cases be dealt with by a single competition authority as often as possible, and that cooperation within the network take place on the basis of equality, respect and solidarity, ECN members should be encouraged to respect each others' enforcement decisions, including those with extraterritorial 'overtones', where an infringement has thereby been brought to an end by an ECN member, in a manner consistent with EC competition rules, and where the views of other relevant ECN members have been expressly considered;**

- **For example, ECN members should give careful consideration to any proposal to allow the well-placed NCA in a particular case to fine an undertaking within its jurisdiction for effects that such undertaking's agreements or practices may have had in another Member State, providing that the above conditions are met and that the consent of the supporting NCA has been granted (i.e. possibility of fining for extraterritorial effects conditional on consent);** *(While the exercise of such powers would not involve extraterritorial application of national enforcement powers, it seems appropriate to make such consent a pre-requisite of such enforcement action for reasons of comity and solidarity within the network.)*³

- **where any other order (i.e. not involving fines) needs to be made in a second Member State to prevent conduct that is affecting the Member State of the well-placed NCA, the relevant supporting NCAs should cooperate to that end (i.e. no possibility of extraterritorial cease and desist orders by the well-placed NCA). For example, other NCAs should assist the well-placed NCA in its investigation and in the implementation of any conclusions reached or any decision that it may make, unless they can demonstrate good reasons not to do so, whether this be with respect to the particular circumstances relating to the market in their Member State, or the legal powers that they can exercise.** *(An exercise of any non-fining powers by the well-placed NCA with respect to the jurisdiction of another Member State would involve extraterritorial application of national enforcement powers. Even though such extraterritorial application would be for the purpose of enforcing EC competition law,*

³ The CLF does not underestimate the practical problems that may arise through the exercise of such fining powers; indeed, some problems may make the suggestion unworkable. Nevertheless, as a general point, the suggestion would appear to be a practical application of the general principles upon which the ECN is based and on that basis is suggested to the ECN for further discussion and debate. Many issues arise: should something more active than consent be required? i.e. should the supporting NCA have to request that the well-placed NCA fine for effects in the former's territory?; should the undertakings concerned have some input into the process? To be clear, though, the intent of the suggestion is to facilitate the efficient operation of the ECN, and the effective enforcement of EC competition rules; not to permit the creation of a process that may be detrimental to the system as a whole.

it would be likely to chill the very enforcement cooperation that the ECN requires and which it is designed to facilitate. Inter-NCA cooperation is preferable in such cases, with each NCA being required to exert its powers with respect to its jurisdiction, albeit in cooperation with other NCAs to ensure the elimination of the infringement.)

- **The same approach should be applied to commitments, i.e. the supporting NCAs would normally be expected to accept similar commitments to those obtained by the well-placed NCA, unless there are good reasons for pursuing a different outcome by reference to market conditions or circumstances in the supporting NCA's national territory, even though the closure of a case on the basis of commitments would not involve a formal infringement decision.**

1.2.2 European Commission particularly well placed to act

The CLF agrees that the European Commission is 'particularly well placed' to act in two general circumstances:

- a) if one or more agreements (or similar agreements) have effects on competition in more than three Member States; or
- b) where a Community decision is required to develop Community competition policy, ensure effective enforcement or if a case is closely linked to other Community policies for which the European Commission has exclusive competence.

a. European Commission 'particularly well placed' due to effects on competition in more than three Member States

The CLF accepts that although the European Commission is deemed to be 'particularly well placed' when an agreement or practice affects competition in more than three Member States, there is no legal obligation upon the European Commission to take such a case. Indeed, the European Commission may decide that enforcement priorities or other reasons lead it to decline jurisdiction and leave the matter to the NCAs who are also responsible for the affected markets. Independently, there may be strong arguments for the relevant NCAs to handle the matter in cooperation with one another. In either scenario, however, the CLF notes that there is likely to be some delay while the ECN members deliberate on the matter and allocate their responsibilities. Furthermore, the CLF is concerned that national review (or reviews) of cases involving effects on competition in more than three Member States will be likely to significantly put at risk the consistent application of EC competition rules even with obligations on ECN members to cooperate with one another. In this regard, the CLF notes that the European Commission is not

only equal to all other ECN members, but also has the ultimate responsibility for developing policy and safeguarding efficiency and consistency, being obliged of course to fulfil such additional responsibility with the utmost regard for the cooperative nature of the ECN.⁴ With this additional responsibility of the European Commission in mind, and with a view towards eliminating the potential for delay, uncertainty and the risk of inconsistent application of EC competition rules, the CLF therefore suggests that:

- **when an agreement or practice has effects on competition in or otherwise involves more than three Member States materially, the European Commission should have primary jurisdiction, without prejudice to the prosecutorial discretion that it shares with all ECN members to decide whether or not to investigate a particular matter; in such circumstances, therefore initial allocation of the case to the European Commission should therefore be automatic. In particular, such automatic allocation should always occur with respect to allegations of an infringement of Article 81 relating to a cartel involving more than three Member States;**
- **if there are circumstances in a particular case that result in disagreement about the extent to which Member States are affected, the European Commission and the relevant NCAs should be required to determine which authority (or authorities) have jurisdiction, and designate a lead authority in that regard within an abbreviated case allocation period (i.e. 6 weeks, see discussion in 1.2.3 below);** *(An abbreviated period for case allocation minimises delay; the designation of a lead authority hopefully goes some way towards alleviating the concerns about inconsistent application of EC competition rules.)*
- **where a lead authority has not been designated within the case allocation period, the European Commission should designate either an NCA or itself as the lead authority** *(This suggestion is intended to provide certainty and to induce timely allocation and designation of the lead authority.)*
- **in all cases that are subject to case allocation discussions among ECN members, the undertakings concerned should be kept apprised of any changes, potential changes or additions of well-placed relevant authorities.**

⁴ Joint Statement, see above, para 9

- b. **European Commission ‘particularly well placed’ to develop Community competition policy or to ensure effective enforcement; or case closely linked to other Community policies for which the European Commission has exclusive competence**

The CLF suggests that

- **in such cases the European Commission should take jurisdiction, and set out clearly to ECN members and the undertakings concerned, the rationale on which this decision is made, within an abbreviated period of 4 weeks.** *(In such cases the rationale for the European Commission taking jurisdiction is unlikely to be affected by discussion of case allocation matters with individual NCAs. It would appear that a markedly abbreviated period for case allocation is therefore appropriate.)*

1.2.3 More than one NCA is ‘well placed’ to act

A significant number of cases will involve agreements or practices that affect interstate trade or otherwise involve more than one Member State. In such cases, there is likely to be some disagreement in the first few months and years of the ECN’s operation about the meaning and application of the various case allocation criteria. Naturally, further guidance and clarity will evolve through the resolution of such disagreements. At the current time, a degree of flexibility within the ECN seems preferable to a quest for a detailed set of allocation rules about which agreement may be impossible, or which may not cover all fact situations in any event. The CLF applauds the efforts that ECN members have already undertaken to ensure that their network is based on equality, respect and solidarity. Such principles provide a firm foundation from which further cooperation can develop, and are likely to ensure that in most cases any disagreements will also be resolved in an amicable manner.

The CLF notes that certain disagreements over jurisdiction, or over the most optimal way for ECN members to work together on particular cases, are already foreseeable. For example, under the existing case allocation criteria, it is possible for more than one NCA to be ‘well placed’ with respect to a particular matter. In such cases, inter-NCA cooperation is essential to ensure an effective enforcement decision. However, even in such circumstances there will be situations where cooperation may break down or be delayed, and efficient and effective enforcement thereby impeded. Indeed, in some cases – for example – where NCAs do not accept that their counterparts are as ‘well placed’ as they may appear to be, cooperation may not even be forthcoming.

Whether disagreements are minor or appear to be fundamental, the CLF is of the view that they need to be addressed in an efficient and objective manner, and without reliance on the courts or on intervention by the Commission pursuant to Article 11 (6), other than as a very last resort.⁵ A system of efficient, rapid and cooperative case allocation should be fostered.

The CLF is therefore of the view that even at this early stage, it would be sensible - and may even be possible - to introduce into the ECN case allocation system a degree of greater clarity without hampering the flexibility that the ECN requires in order to evolve. Indeed, a small degree of extra clarity at this stage may help further build the channels along which cooperation can evolve, rather than allow barriers to cooperation to have to be challenged, defended and removed before cooperation can occur.

The CLF believes that one way to provide such clarity, while allowing ECN members the flexibility they need, is by creating a process which induces ECN members to state their interests and allocate their cases rapidly, with a minimum opportunity for strategic behaviour or delay. Therefore, and with due respect to the *Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities*, the CLF suggests that:

- **in any case which has come to their attention through notification under Article 11 (3), NCAs should be required to inform members of the ECN of their interest and to provide a brief explanation of the facts on which such interest is based (e.g. an indication of which markets are affected and the infringement being alleged) within 2 weeks of receipt of such notification; (*While short, such a period should be more than enough time for a competent authority to identify whether it has an interest in such a case and briefly explain why, particularly if it has an active and diligent ECN coordination unit in place. Any longer period would only guarantee that a backlog of cases develops resulting in inadequate consideration of cases and communication of relevant interests within the ECN.*)**

⁵ The judiciary will not be well placed to determine many matters that are relevant to the particular criteria on which case allocation decisions may be based. Moreover, any clarification that the courts may offer would only be after considerable delay. Also, reliance on the courts does nothing to instil an ethic of cooperation within the ECN. Indeed, it could exacerbate and complicate disputes, particularly if there were multiple applications to various courts in different Member States.

Similarly, the Commission's ability to relieve an NCA of its competence to apply Articles 81 and 82 (Article 11 (6)) or to bring proceedings against a Member State for acts that appear to amount to an infraction of the Treaty are also rightly measures of last resort.

As *ex post* remedies to problems, reliance on the courts or the Commission may of course act as a deterrent on nationalistic or simply uncooperative behaviour. However, this would do nothing to induce an air of positive cooperation within the ECN. Indeed, it may only serve to entrench particular positions further.

- failure to inform the ECN of such interest and explanation within the 2 week period should prevent an NCA from asserting jurisdiction as a well-placed authority (absent new evidence of a material link to the jurisdiction of that NCA subsequently arising);
- the NCAs that have stated their interest within the 2 week period should designate the authority or authorities that are 'well placed' to handle the matter within a further 4 weeks; (*i.e. the overall case allocation period should be reduced from 8 weeks to 6 weeks*).
- where NCAs have determined that more than one authority is 'well placed' to handle a particular matter, within that same 4 week period the NCAs should designate a lead authority with respect to the matter, such authority in particular being responsible for the coordination of investigative measures and requests for information of the undertakings involved;
- a definitive communication of the authorities designated as 'well placed' and the lead authority for the case should be made to the ECN and to the undertakings involved at the time of designation; such communication should also set out the official language of the case and the contact details of the relevant case handlers at the lead authority;
- failure to allocate and communicate such designation within the 6 week case allocation period should result in
 - o the NCA originally in receipt of the relevant complaint or who initiated the first *ex officio* proceedings being designated as the lead authority
 - or
 - o where more than one NCA received the original complaint, initiated *ex officio* proceedings or was found to be well placed to act, one NCA being designated by the European Commission as lead authority;
- the above procedure should be without prejudice to the right of any NCA to impose interim measures in a particular case, subject only to its obligation to inform the network of such measures, and without thereby creating any presumption that the NCA will be designated the 'lead authority' with respect to the case;
- while recognising that the *Framework Directive for Electronic Communications* is sector-specific and related primarily to substantive case analysis, the operation of a decentralised system of enforcement in that sector resulted in the recognition of a need for a greater oversight role on the part of the European Commission. The CLF therefore considers that the procedures implemented under Article 7 of that Directive

with respect to cooperation between NRAs and the European Commission may be of relevance to identifying additional ways of ensuring that NCA-European Commission cooperation in the enforcement of Articles 81 and 82 evolves in a manner which ensures the consistent enforcement of EC competition rules.

1.3 Applications for leniency

The CLF recognises that some Member States are not yet convinced of the benefits of a national leniency policy, or if so, have not yet implemented one. The CLF is also aware that there are significant differences among the leniency regimes that do exist. It considers that implementing a uniform leniency policy throughout the 26 ECN members would be ideal from both the perspective of enforcers and of undertakings; however, such is unlikely to occur in the short term.

The absence of a uniform leniency policy throughout the Community creates various problems for undertakings and for the ECN. For undertakings, the absence of a uniform leniency policy creates uncertainty and the prospect of an undermining of any rights that they may have accrued by complying with a leniency programme in one Member State. For enforcers, the resulting reduction in the incentive to whistle-blow means that enforcement action may be sub-optimal.

The CLF therefore suggests that until such time as a uniform leniency policy is implemented:

- **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;**
- **alternatively, with respect to an alleged breach of EC competition rules in any Member State, 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. Where the application for leniency specifies the Member States with respect to which the application is made, the recipient authority should distribute details of the application to the NCAs from those Member States. The time of application to the original recipient authority, and its rules pertaining to receipt of such applications, should be determinative (as to timing and receipt of a completed application) in all identified Member States, so long as the applicant provides such additional material as other relevant NCAs may require within a reasonable time;**

- **neither the existence of a leniency application to the European Commission (or to an individual NCA) nor its contents should be transmitted to ECN members who have not implemented a leniency programme;**
- **where a request for leniency is made to and granted by the European Commission with respect to a case that is subsequently handled by an NCA or NCAs, the leniency granted by the European Commission should transfer with the case, provided that the relevant Member States of the NCA or NCAs in question were referred to in the original leniency application; and that**
- **ECN members continue to strive for a harmonised leniency policy in Europe, ideally through the implementation of a Directive or Regulation.**

2. Exchange and use of information within the ECN

The CLF recognises that the exchange and use of confidential information is necessary for the effective enforcement of competition law by different competition authorities. The CLF also recognises that undertakings will want to maintain the confidentiality of their business secrets and other information which they provide willingly (or not) to the authorities. In particular, undertakings will be concerned that information which is subject to lawyer-client privilege in one jurisdiction is afforded a similar degree of protection in another.

At present throughout the Community, there are different standards of protection for confidential information, business secrets, and information that is subject to lawyer-client privilege or its equivalent. Furthermore, the members of the ECN will have different degrees of familiarity with the kind of exchange and use of confidential information that is appropriate.

Therefore, to ensure that the exchange and use of confidential information among the members of the ECN can occur in a manner that does not undermine the legitimate rights of undertakings (and thereby does not undermine the legitimate furtherance of enforcement action), the CLF notes that a fundamental reform and harmonisation of treatment of confidential information (and that which is or should be subject to lawyer-client privilege) is now more important than ever. In that regard, the CLF suggests that

- **the ECN should agree a Community-wide concept of professional secrecy and of lawyer-client privilege that can apply to the exchange and use of information within the ECN.**