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Current Issues of E.U. Competition Law: The New Competition Enforcement Regime

*Philip Lowe**

On May 1, 2004, two major reforms of the EC competition enforcement regime are expected to enter into force: the modernization of antitrust enforcement, based on Regulation 1/2003,¹ and the review of the European merger control system. In this contribution, I will outline the main principles underlying these reforms. In Part I, I will focus on the instruments the Commission intends to adopt early in 2004 in order to guarantee the efficient functioning of Regulation 1/2003, the so-called modernization package. Subsequently, in Part II, I will present the guiding principles of the future merger control in Europe, as they result from the modifications to the current merger control regulation that the Council agreed upon in November 2003. In addition to these two major reforms, the Commission also is reviewing the Technology Transfer Block Exemption Regulation. In Part III, I will describe the main features of that draft regulation that is also supposed to enter into force on May 1, 2004.

I. IMPLEMENTATION OF REGULATION 1/2003

On December 16, 2002, the Council adopted Regulation 1/2003, which establishes a new European competition enforcement regime based on the joint enforcement of the EC competition rules by the Commission and national authorities. In order for this new enforcement regime to function efficiently from May 1, 2004, the Commission decided to complement Regulation 1/2003 with a package of six accompanying notices and a Commission implementing regulation, the so-called “Modernization Package.” Before going into any details on these notices, which at the

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¹ Council Regulation (EC) No 1/2003 of 16 December 2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1) 1, available at <http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l001/l00120030104en00010025.pdf> (last visited Feb. 15, 2004) [hereinafter Council Regulation 1/2003].

moment of writing are still in a draft phase, I would like to present an overview of some of the basic features of Regulation 1/2003.

A. The New Enforcement System

When the Commission launched in 1999 its White Paper on the modernization of the enforcement of the EC competition rules, it had as a major objective to maintain and, where possible, to improve the effectiveness of the enforcement of the EC competition rules in an enlarged European Union. During numerous debates that representatives of the Commission subsequently had with the academic, legal and business community in Europe as well as with the other institutions of the European Union, it was clear that this objective and the methods suggested to achieve this objective were widely shared. Of course, I do not ignore that the precise modalities of the Commission's proposal to modernize the enforcement of EC competition rules were heavily debated—the reverse would rather have been a surprise. However, what I above all retained from these debates was the common desire to construct a new enforcement system that could guarantee a continued effective application of Articles 81 and 82 of the EC Treaty after the enlargement of the European Union.

I believe that the outcome of those discussions, Council Regulation 1/2003, is an excellent tool to guarantee such an effective competition policy, and will contribute to promoting the single market in a union of twenty-five Member States and more. There are several reasons why I believe this is the case.

First, the notification system has been abolished. The abolition of the notification system means that the Commission can re-focus its enforcement work, not in order to do less but in order to do more meaningful work in the interest of consumers. The Commission will thus be able to intervene more proactively in order to protect competition in Europe.

Second, no longer will the enforcement of Articles 81 and 82 of the EC Treaty be the *de facto* sole responsibility of the Commission, since these two articles become directly applicable in their entirety by Member States, including Article 81(3). The direct applicability of Article 81(3) of the EC Treaty implies *more potential for the application of the EC competition rules by Member States' courts and competition authorities*. Proceedings by national competition authorities and national courts can thus no longer be blocked or delayed by notifications to the Commission. This means that Article 81 of the EC Treaty will be applied in the same way as the other Treaty provisions that are directly applicable to Member States.

Third, the competition rules of the EC Treaty will become the common

competition rules for the whole European Union.² Where a case falls inside the scope of application of Articles 81 and 82, Member States' courts and competition authorities will not be able to leave aside the EC competition rules and base their decisions solely on national law. Under Article 3 of the Regulation 1/2003, they have an obligation to apply the EC competition rules, at least alongside national law. Of course they may also apply Articles 81 and 82 on a stand-alone basis.

Finally, the joint enforcement of Articles 81 and 82 of the EC Treaty will lead to an increased effectiveness of the enforcement of competition rules, if all enforcers apply the rules in a coherent way. Regulation 1/2003 provides for mechanisms of co-ordination and co-operation between the Commission and the national authorities to achieve such coherent enforcement.³

1. The Modernization Package

The modernization package constitutes the central part of the Commission's implementation of Regulation 1/2003. It consists of six notices and a Commission implementing regulation,⁴ which mainly addresses the handling of complaints, the modalities for the hearing of the parties concerned, complainants and third parties, as well as the access to file and the treatment of confidential information. In October 2003, the drafts of these texts were published for public consultation⁵ and at the moment of writing, we are still analyzing the comments received. Early next year, the Commission will adopt the final package, which will be ready for application on May 1, 2004.

Below, I will highlight the main elements of the six draft notices in the following paragraphs. There are two notices on points of substance (the notice on the effect on trade concept and the notice on the application of Article 81(3) of the EC Treaty), two notices on relations with certain

² *See id.* at art 3.

³ *See id.* at ch. IV.

⁴ Draft Commission Regulation on proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, 2003 O.J. (C 243) 3; Draft Commission Notice on cooperation within the Network of Competition Authorities, 2003 O.J. (C 243) 11; Draft Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, 2003 O.J. (C 243) 20; Draft Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, 2003 O.J. (C 243) 30; Draft Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters), 2003 O.J. (C 243) 42; Draft Commission Notice Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, 2003 O.J. (C 243) 45 [hereinafter Draft Guidelines]; Draft Notice – Communication from the Commission Guidelines on the application of Article 81(3) of the Treaty, 2003 O.J. (C 243) 62.

⁵ *Id.*

stakeholders (the notice on guidance letters and the notice on the handling of complaints), and finally, two notices on the co-operation with the other enforcers: the national competition authorities and the national courts.

a) The Guidelines on the Effect on Trade Concept

The effect on trade concept is the jurisdictional criterion that determines the scope of application of Articles 81 and 82 of the EC Treaty. This has always been the case, so why now a Commission Notice? The answer lies in the enhanced interest for guidance on this concept as Member States' courts and competition authorities will apply Articles 81 and 82 more often. The question whether a case tests red or blue in terms of effect on trade is decisive to concluding whether it is inside or outside Articles 81 and 82, inside or outside Regulation 1/2003, and, in particular, inside or outside Article 3 of that Regulation.

Against this backdrop, the Commission has agreed to produce a notice on the effect on trade concept. We have, however, made clear from the very beginning that there can be no question of attempting to modify the scope of application of Community law in one way or another. The notice describes and explains the current case law, presenting it in a systematic framework.

We propose a new rule concerning the notion of appreciable effect on trade, the so-called "NAAT-rule" (Not Appreciably Affecting Trade). This NAAT-rule contains two cumulative thresholds: one is a 5% market share threshold, and the other is a turnover threshold of € 40 million, calculated on the basis of the products covered by the agreement.⁶ For agreements or practices by parties that fall below both thresholds, there would be a refutable presumption that trade between Member States is in principle not capable of being appreciably affected.

This NAAT-rule is specific to the jurisdictional criterion of effect on trade and distinct from the policy orientations in the Commission Notice on agreements of minor importance, which do not appreciably restrict competition (the "*de minimis* notice"). The latter only concerns the question of whether there is no appreciable *restriction* of competition.

b) The Guidelines on the Application of Article 81(3) of the EC Treaty

Decentralized application of Article 81(3) is one of the main elements of the new system, and there is, in our view, a need for the Commission to explain what the methodology is for applying this exception rule. For instance, it is very important that we explain the types of efficiency that may be created by restrictive agreements and the conditions for finding that consumers receive a fair share of these benefits. The draft notice goes over

⁶ Draft Guidelines, *supra* note 4, at 50-51, at para. 52.

all the conditions of application of the provision, explaining the legal notions and providing indications on underlying economic concepts.

The notice on Article 81(3) does not replace, but rather complements the more detailed Commission guidelines on specific types of agreements, and, in particular, the guidelines on vertical restraints and the guidelines on horizontal co-operation agreements.⁷ Thus, the notice on Article 81(3) forms the general chapter in the guidance book that the Commission has put together for the past several years.

c) The Notice on the Handling of Complaints

In the new enforcement system, market information from businesses and consumers will become important to the Commission. We would like to encourage consumers and businesses to come forward and inform us about suspected infringements of the competition rules. We will create a new electronic address and invite consumers and businesses to provide information on suspected infringements in any form they find appropriate.

However, not everybody has a fully developed complaint to make. Market information from several sources has to be collected before it combines to a picture that allows us often to start looking into a case *ex officio*. In order to improve the quality of complaints from the outset and allow the Commission to focus on the complaints that merit priority treatment, the draft Commission implementing regulation proposes to introduce a requirement for complaints. These complaints will be adjudged against a “checklist” that sets out certain types of information that should be provided. As soon as this minimum amount of information has been provided, the Commission undertakes in the notice on complaints to inform complainants within an indicative time period of four months whether it intends to pursue the complaint in view of a full investigation of the case.

d) The Notice on Guidance Letters

When the Commission first made the proposal to abolish the notification system, some feared that it would lead to a reduction in legal certainty. We have taken this concern seriously, which is one of the reasons why it is of paramount importance to us to have the modernization package ready before the date of application of Regulation 1/2003.

I realize that general guidance via block exemption regulations and notices may not be capable of solving all problems of unpredictability. Conversely, the Commission cannot be obliged to issue guidance upon simple request, because that would just be a different name for the current

⁷ Commission Notice Guidelines on Vertical Restraints, 2000 O.J. (C 291) 1; Commission Notice Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, 2001 O.J. (C 3) 2.

notification system.

In the notice on guidance letters, the Commission explains the criteria by which it will be led in its decision whether or not to provide written guidance. The most important one is the existence of a genuine unresolved issue concerning the application of Articles 81 and 82 of the EC Treaty. We propose to take account of additional factors, such as the economic importance from the perspective of consumers of the products concerned and the importance of the agreement or practice in terms of its prevalence. We also propose to take into account the level of investment made or envisaged by the parties and the extent to which the transaction involves a structural operation.

In my view, these factors strike a good balance between the public interest in the Commission using its resources to promote the general good and the private interest of the parties in obtaining guidance in their particular case.

e) The Notice on Co-operation with National Courts

Under Regulation 1/2003, national courts will play an enhanced role in the enforcement of EC competition rules.⁸ The draft notice is intended to serve as a practical tool for national judges who apply Articles 81 and 82 in conformity with Regulation 1/2003. With that objective in mind, the draft notice addresses two topics.

First, the draft notice gives general explanations about the procedural context in which national judges are operating when applying Articles 81 and 82. The notice underlines that alongside the national procedural law, judges also have to take into account procedural rules emanating from Regulation 1/2003 or from the general principles of Community law. The Notice assembles relevant case law of the Community courts on this latter point. Particular attention is also given to the situation in which a national court deals with a case in parallel with or subsequent to the Commission, thereby recalling the principles outlined by the Court of Justice in the *Masterfoods* case⁹ and by the Council in Article 16 of Regulation 1/2003.¹⁰

Second, the draft notice focuses on the co-operation instruments of Regulation 1/2003. Indeed, Regulation 1/2003 for the first time establishes a firm legal basis for national judges to ask the Commission for an opinion or for information it holds. In addition, the regulation also created the possibility for the Commission and for the national competition authorities to submit written and oral observations to the national courts in the interest of coherent application of the EC competition rules. The notice spells out

⁸ Council Regulation 1/2003, *supra* note 1, at art. 6.

⁹ C-344/98, *Masterfoods Ltd. v. HB Ice Cream Ltd.*, 2000 E.C.R. I-11369.

¹⁰ Council Regulation 1/2003, *supra* note 1, at art. 16(1).

how the Commission intends to put these co-operation mechanisms in practice. Since the aim of the *amicus* instrument is to promote consistent application of Articles 81 and 82, the Commission only intends to use this instrument where there is a real issue of coherent application. Its briefs will thus be strictly limited to the aspects of the case that raise an important issue of consistency. It is of course up to the courts to involve the parties—as appropriate in the respective procedural framework—and to take into account the submission of the Commission in its decision as it sees fit.

The Commission will also not seek any contacts with the parties to a litigation in respect of which it has been asked for an opinion or considers submitting an *amicus* brief. Both types of interaction are a matter between the national court and the Commission. They are intended to allow the Commission—in the public interest—to draw the court's attention to important issues relating to the application of Articles 81 and 82, no more, no less.

f) The Notice on the Co-operation Within the Network of Competition Authorities

The Network Notice explains the main pillars of the co-operation between the competition authorities inside the European Competition Network (“ECN”). The notice develops principles for allocating work between the members of the network. In this context, it is useful to recall that Regulation 1/2003 creates a system of parallel competences for all network members to apply Articles 81 and 82 of the EC Treaty. That implies that the case allocation criteria as they are formulated in the draft notice on the co-operation within the ECN cannot be qualified as rules for the allocation of competence. The case allocation criteria are merely indicative criteria for the division of work between the network members.

The criteria can be roughly summarized as follows: cases should be dealt with by an authority that is well placed to restore competition on the market. It follows that a single national competition authority is usually well placed to deal with agreements or practices that substantially affect competition mainly within its territory. Single action of a national competition authority may also be appropriate regarding infringements of wider scope where the action of a single national competition authority is sufficient to bring the entire infringement to an end.

Where an agreement or practice has substantial effects on competition in several territories and the action of only one authority would not be sufficient to bring the entire infringement to an end or to sanction it adequately, parallel action by two or three Member State competition authorities may be appropriate in order to ensure effective deterrence and to avoid under-punishment. Of course, such parallel action should involve close coordination between the authorities concerned in order to avoid any

inconsistent outcome.

Where an infringement has effects in more than three Member States, the Commission will often be considered to be best placed to deal with a case.

These indications concerning case allocation are primarily designed so as to guide complainants, leniency applicants and competition authorities, thus ensuring that the vast majority of cases are dealt with by a well-placed authority from the very beginning. Other authorities, equally competent and possibly also well placed, would in those circumstances abstain from acting. The situation where one authority starts a case that is then further pursued by another (a situation often referred to as “re-allocation”) should therefore be very rare.

These orientations are of course without prejudice to the responsibility of the Commission to take up cases that are potential precedents in order to set policy for the internal market. The purpose is to ensure coherence or to compensate for a lack of enforcement in parts of the Community where that is really necessary because serious infringements would otherwise persist or remain unsanctioned.

B. Review of the Merger Control Regulation

The Merger Control Regulation (“Merger Regulation”), the first Europe-wide merger control law, has now been in force for more than thirteen years. This innovative piece of legislation granted the Commission the exclusive jurisdiction to examine large, cross-border mergers in Europe so as to assess their likely impact on competition. It has served to facilitate corporate restructuring in Europe by ensuring regulatory clearance within a timetable that corresponds to the needs of business.

In December 2002, the Commission adopted a blueprint for the most far-reaching reform of European merger control since the European Council of Ministers finally adopted the Merger Regulation in December 1989.¹¹ This reform was the outcome of a review program which was initiated in 2000, culminating in the adoption of a Green Paper by the Commission in December of 2001.¹² Central to the reform was a new draft Regulation. On November 27, 2003, the Council of Ministers reached unanimous political agreement on a new Regulation, which will shortly be formally adopted by the Council, and which will become applicable on May 1, 2004, in time for the enlargement of the European Union. Ten new Member States will join the European Union on the same day.

¹¹ Commission Proposal for a Council Regulation on the control of concentrations between undertakings, 2003 O.J. (C 20) 4.

¹² Green Paper on the Review of Council Regulation (EEC) No. 4064/89, COM(01)745 final at 6, available at http://europa.eu.int/eur-lex/en/com/gpr/2001/com2001_0745en01.pdf (last visited Mar. 5, 2004)

1. The Commission's Record in Merger Control: Time for Reform

The E.U. merger control regime has facilitated industrial restructuring in Europe. It has provided a "one stop shop" for the scrutiny of large cross-border mergers, dispensing with the need for companies to file in a multiplicity of national jurisdictions in the European Union; it has guaranteed that merger investigations will be completed within tight deadlines; a remarkable degree of transparency has been maintained in the rendering of decisions - each and every merger notified to the Commission results in the communication and publication of a reasoned decision.

The Merger Regulation has served Europe well. However, like all other systems, it is in need of constant revision to ensure that it is fitted to grapple with the evolving challenges which it faces. Over the past thirteen years, the Commission has reviewed more than 2,000 mergers and acquisitions, some 90% of which were cleared unconditionally following a one-month review. Since 1990, the Commission has prohibited only eighteen deals, less than 1% the total notified. But the system put in place in 1990 has been showing some signs of strain. Merger activity has increased beyond most expectations since the introduction of the Merger Regulation. The number of concentrations notified to the Commission increased spectacularly during the 1990's, to the point where the Commission now annually reviews more than five times as many cases as in the early years. Higher levels of industrial concentration have necessitated greater sophistication in the economic analysis contained in the Commission's reasoned decisions in the field of merger control, and those decisions have been subject to increasingly close scrutiny by the European courts.

The three judgments delivered last year by the European Court of First Instance ("CFI") on the bid by Airtours (now MyTravel) for First Choice,¹³ and its more recent rulings on the French electrical equipment merger between Schneider and Legrand¹⁴ and on the Tetra Laval/Sidel transaction,¹⁵ raised important issues concerning the functioning of the E.U. merger review process. In particular, it is clear that the CFI is now holding the Commission to a high standard of proof, which has important implications for the way in which the Commission conducts its investigations.

Reform must not, however, undermine the very real merits inherent in the current system. What the Commission has proposed, therefore, are significant improvements to the current system, transforming what is already a very good system into an even better one. In a nutshell, the key

¹³ Case T-342/99, *Airtours v. Commission*, 2002 E.C.R. II-2585.

¹⁴ Case T-77/02, *Schneider Elec. v. Commission*, 2002 E.C.R. II-4201.

¹⁵ Case T-80/02, *Tetra Laval v. Commission*, 2002 E.C.R. II-4519.

rationale underlying the reform is two-fold. First, it is designed to enhance the transparency and consistency of the Commission's policy with regard to merger control analysis. Second, it seeks to improve the Commission's decision-making process, making sure that merger investigations are more thorough, more focused, and more firmly grounded in sound economic reasoning. At the same time, investigations must always be conducted with regard to the rights of the merging parties as well as of third parties.

2. The Reform Package

The reform package in the field of EC merger control consists of a number of elements, including, first and foremost, a proposal for a new Council Regulation on the control of concentrations between undertakings (the new EC Merger Regulation).¹⁶ The proposal has now been adopted by the EC Council of Ministers, and is described in greater detail below.

Draft Commission guidelines on the assessment of "horizontal" mergers are also a crucial element of the package.¹⁷ These guidelines comprehensively articulate the Commission's approach to the assessment of such merger transactions when determining their likely impact on competition. The draft has been the subject of wide public consultation of both Member States and interested third parties during the course of 2003, and the final version will shortly be adopted.

Draft best practices on the conduct of merger investigations have also been published, which have likewise been the subject of wide public consultation of interested parties, notably the legal and business community, during the course of 2003. A final version will shortly be published on the Commission's Directorate-General ("DG") Competition website. The draft best practices cover the day-to-day handling of merger cases by DG Competition, and the Commission's relationship with the merging parties and interested third parties, and in particular concerning the timing of meetings, transparency, and due process in merger proceedings.

In addition to these elements, a number of other measures relating to the staffing and internal organization of the Commission's DG for Competition have been decided upon. They include:

- reorganizing antitrust and merger staff on sectoral lines to allow for

¹⁶ Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings, 2004 O.J. (L 24) 1, *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_024/l_02420040129en00010022.pdf (last visited Mar. 5, 2004) [hereinafter Regulation 139/2004].

¹⁷ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2004 O.J. (C 31) 5, *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/c_031/c_03120040205en00050018.pdf (last visited Mar. 5, 2005) [hereinafter Assessment Guidelines].

- better focus on market development and more flexible use of resources among cases;
- the establishment of a peer review mechanism for major cases, with a systematic appointment of a “fresh pair of eyes” team to take stock of each case; and finally,
 - the creation of a new position of Chief Competition Economist in the Directorate General, and the appointment of its first incumbent, Lars-Hendrick Röller, an industrial economist of international reputation.

3. The New Merger Regulation

On November 27, 2003, the Council reached political agreement on a recast Merger Regulation substantially incorporating the reforms proposed by the Commission in December 2002. These reforms relate to the substantive test in Art. 2, to procedural issues such as the timing of notifications, investigation time limits, the Commission’s decision-making powers, and to the question of case-allocation among jurisdictions within the European Union.

a) The Substantive Test

One of the central aims of the proposed reform was to ensure that the substantive test in the Merger Regulation could cover effectively all anti-competitive mergers while at the same time ensuring continued legal certainty. The Commission had launched via its Green Paper a reflection on the effectiveness of the substantive test in Article 2 of the Merger Regulation (the “dominance test”) and in particular on how this test compares with the “substantial lessening of competition” (“SLC”) test used in several other jurisdictions. Among the main arguments in favor of a change to SLC were that such a test would be inherently better-suited to dealing with the full range and complexity of competition problems that mergers can give rise to, and in particular that there may be a gap or gaps in the scope of the current test. Indeed, it emerged from our review last year that there were particular concerns that the Regulation might not be able to tackle all situations of oligopoly in markets for differentiated products, when the merger would involve the elimination of a significant competitive constraint. However, it would neither result in the creation or strengthening of the paramount firm in the market, nor in a likelihood of coordination between the oligopolists. Conversely, however, it was felt that adopting an altogether new test might jeopardize the preservation of the precedent built up under the Regulation, including the jurisprudence developed by the Courts over the years, thereby reducing legal certainty. As a result, the Commission proposed that the scope of the test should be clarified.

The text of the new test adopted by the Council states that “a

concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.”¹⁸ This new test achieves the Commission’s original aims. Legal certainty is enhanced through the closing of any perceived gap in the previous test, while at the same time past precedent, including the caselaw of the European courts, is retained. It should moreover be stressed that the new test will be applied on the basis of a sound economic framework of assessment as set out in the Guidelines on Horizontal Mergers (soon to be adopted).¹⁹ The Commission also intends to adopt further Guidelines on Vertical and Conglomerate Mergers.

b) Procedural and Jurisdictional Issues

The new Regulation provides for a number of changes which are aimed at increasing the flexibility of the system while retaining the principle of ex-ante control with clear, legally-binding deadlines. A system of mandatory notification with suspensive effect is retained, but greater flexibility is introduced into the requirements for timing of notifications and the definition of the triggering event has been modified.²⁰

c) Time Limits for Investigation

In regards to the time limits for investigation, the new Regulation makes a number of significant amendments to the existing provisions. First, the old deadlines have now all been converted into “Working Days” deadlines, with some consequent minor alterations in the time periods.²¹ For example, the previous Phase I deadline of one month will, starting on May 1, 2004, become twenty-five working days. Second, the six-week deadline in Phase I applicable to cases where commitments have been offered or where a request for referral has been received, has become thirty-five working days.²² Third, for the deadlines in Phase II, the new Regulation provides for a fifteen-working-day automatic extension of the deadline to 105 working days where remedies have been offered by the parties.²³ The objective of this provision is to allow for greater consultation of third parties and Member States. However, this extension will not apply if remedies are offered at an early stage in the procedure, i.e. less than fifty-

¹⁸ Regulation 139/2004, *supra* note 16, at art. 2(3).

¹⁹ Assessment Guidelines, *supra* note 17.

²⁰ Regulation 139/2004, *supra* note 16, at art. 4(1).

²¹ *Id.* at art. 10.

²² *Id.* at art. 10(1).

²³ *Id.* at art. 10(3).

five working days into the Phase II procedure.²⁴ Fourth, there is provision for a twenty working day extension of the Phase II deadline in complex Phase II cases.²⁵ Such an extension will, however, only be made at the parties' request or with their consent.

d) Timing of Notifications

The new Regulation also provides for more flexibility in regards to the timing of notifications to the Commission. Under the new legislation, it will be possible to notify a transaction prior to the conclusion of a binding agreement provided that there is a good faith intent to enter into an agreement.²⁶ The current deadline for notification of one week from the conclusion of the agreement is also removed, provided that no steps are taken towards implementation.²⁷ These more flexible rules should allow companies to better organize their transactions without having to fit their planning around unnecessarily rigid rules, and should facilitate international cooperation in merger cases, particularly when it comes to synchronizing the timing of investigations by different agencies.

e) Enhanced Fact-Finding Powers

With regard to the Merger Regulation's fact-finding provisions, the new Regulation provides, with some exceptions, for the alignment of its fact-finding powers, including the fining provisions, with those provided in the new implementing Regulation for Articles 81 and 82 of the EC Treaty. In particular the new Regulation provides for an increase in the maximum level of fines to be applied in the case of incorrect or misleading information being provided,²⁸ as well as an increase in the level of periodic penalties applicable in the case of failure to comply with requests for information.²⁹ This should enable the Commission to obtain information more easily and thus to improve the efficiency and efficacy of its investigations.

f) Jurisdictional Issues: Simpler and More Flexible Allocation of Cases

One of the main objectives of the reforms proposed by the Commission was to optimize the allocation of cases between the Commission and national competition authorities in light of the principle of subsidiarity, while at same time tackling the persistent and increasing

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at art. 4(1).

²⁷ *Id.*

²⁸ *Id.* at art. 14(1).

²⁹ *Id.* at art. 15(1).

incidence of “multiple filings” (notifications having to be made to several competition authorities within the European Union). The new Regulation provides, first, for a streamlining of the referral system, including a simplification of the criteria for such referral,³⁰ and second, it introduces the possibility for notifying parties to request referrals at the pre-notification stage.³¹ The changes are designed to ensure that, in line with the principle of subsidiarity, the case is dealt with by the authority best placed to deal with it, while at the same time keeping to a minimum the number of cases requiring multiple filing.

C. Review of the Technology Transfer Block Exemption Regulation

This review process started in December 2001, when the Commission adopted a mid-term review Report on the application of the Technology Transfer Block Exemption Regulation (“TTBE”).³² We took this as an opportunity to start a thorough review of our policy towards intellectual property licensing agreements.

Technology transfer activities have considerably evolved during recent years. It seems that more joint efforts and more complex licensing arrangements are now required to keep pace with the greater complexity of new technologies but also to overcome the problems of “patent thickets.” And as licensing activities are often global it is good to discuss the issues not just with interested parties from Europe but also from the United States.

However, there are other reasons underlying this review. In particular the TTBE is rather formalistic and legalistic and not in line with the more economic approach adopted under the new rules on distribution and horizontal co-operation agreements. The 2001 Report highlighted the need to adapt the TTBE to ensure more consistency with the new generation of Commission block exemptions concerning distribution, research and development, and specialization agreements which are based on a more economic approach.

In 2002, stakeholders were consulted on the review report. After that, the details were worked out for a new block exemption regulation and a set of guidelines. The draft texts for the new block exemption regulation and guidelines were adopted by the Commission for consultation purposes just before the summer break of 2003. They were discussed with Member States in September 2003 and were published on October 1, 2003, for consultation of industry and consumer organizations and other interested third parties during the months of October and November 2003. At the

³⁰ *Id.* at arts. 4(4-5), 9(2a), 22(1).

³¹ *Id.* at art. 4(4-5).

³² Commission Regulation (EC) No. 240/96 of 31 January 1996 on the application of Article 85(3) of the Treaty to certain categories of technology transfer agreements, 1996 O.J. (L 31) 2.

time of writing, this consultation period was just ending.

1. Finding the Right Balance

The old view was that Intellectual property rights (“IPRs”) created monopolies while competition policy sought to eliminate monopolies. However, as already stated in the Report, we do not perceive competition policy and innovation policy as being at odds with each other. Both have a complementary role and aim to promote innovation to the benefit of consumers. Contrary to what some might think, competition is a necessary stimulus for innovation.

In many cases, having an IPR will not automatically imply having market power as sufficient competing technologies may exist. Licensing, also when it contains restrictions on licensee or licensor, will therefore often be pro-competitive as it allows the integration of complementary assets, allows for more rapid entry, helps disseminating the technology and provides a reward for what was usually a risky investment. However, licensing agreements and restrictions therein may also sometimes be used to restrict competition, in particular in those cases where the IPR does provide the company with market power. It is therefore important in such cases to protect competition.

Increasingly, it is being recognized that patents and the patent system may not always stimulate innovation but may be used to retard innovation. In addition to protecting the returns of innovation for which they are intended, there is evidence of an increasing use of patents to block products of competitors, as bargaining chips in cross licensing negotiations and to prevent or defend against infringement suits. The latter uses of patents are a zero-sum or negative-sum game. Competition policy can not prevent “patent thickets” from coming into existence. However, competition policy can help companies in their efforts to overcome these problems by allowing pro-competitive cross licensing, patent pools and patent settlements, while preventing that such licensing and settlements are used to obtain anti-competitive outcomes.

In other words, competition policy should not be used as an instrument to systematically revise the balance struck by IP laws and impinge on the awarded property rights. However, competition policy should be applied to the ways IPRs are exploited and deal with licensing agreements as it does with other distribution and cooperation agreements between competitors and non-competitors.

2. Main Features of the Draft New Regulation

As at the time of writing, we were near the end of the consultation period so I cannot say much on the details of the new rules. However it is our belief that the new rules will be firmly aligned on the new generation of block exemption regulations and guidelines for distribution agreements and

horizontal co-operation agreements. This was requested by many of those who commented on our Evaluation Report and will have the following advantages:

- 1) The block exemption regulation will only have a black list. By doing away with the white and grey lists of the current regulation, the strait jacket is avoided and the scope of the regulation is extended: whatever is not explicitly excluded from the block exemption is now covered.
- 2) The scope of the new rules will also be extended by covering all types of technology transfer agreements for the production of goods or services. The new regulation is, for instance, proposed to cover not only patent and know-how licensing but also software copyright licensing, as requested by many of those who commented on our Evaluation Report.
- 3) The new rules will make a clear distinction between licensing between competitors and licensing between non-competitors. For obvious reasons competition policy should distinguish between licensing between competitors and between non-competitors as the treatment and in particular the applicable hardcore list should differ. Competition problems are more likely to arise in licensing between competitors than in licensing between non-competitors.
- 4) The safe harbor created by the block exemption will be limited by market share thresholds, different for licensing between competitors and for licensing between non-competitors. The required market share calculation, both for the technology and product market, is proposed to be kept straightforward by only having to look at the presence of the licensed technology on the product market. In other words, market shares are always calculated in terms of sales of the licensed products.
- 5) The new block exemption regulation will have a clear and short hardcore list similar to the list found in the other block exemption regulations. An agreement containing a hardcore restriction can not benefit from the block exemption and is also, in the context of an individual assessment, unlikely to fulfill the conditions of Article 81(3).

3. Comparing the European Union with the United States

This brings me to the comparison of the proposed new rules with the United States policy. Having a block exemption regulation provides a level of legal certainty which companies do not have in the United States, where there are only guidelines. Once covered by the block exemption, the Commission and national authorities can only take this protection away for

the future and not with retro-active effect.

In general, the new rules will bring about an important degree of convergence between E.U. and U.S. policy towards licensing agreements, especially where it concerns licensing agreements between competitors: a similar hardcore list, a similar safe harbor defined by a market share threshold and a similar framework for the rule of reason analysis to be applied outside the safe harbor.

Where it concerns licensing agreements between non-competitors the policy will also be similar to the one in the United States where it concerns restraints which affect inter-brand or inter-technology competition, such as tying and exclusive dealing/non-compete contracts.

For good legal, economic and political reasons the new rules will however keep some more distance to the United States where it concerns intra-technology restraints in licensing agreements between non-competitors. This concerns in particular sales restrictions that can be used to carve up the market without proper efficiency argument. The reasons for this continued divergence with the United States are threefold:

- First, territorial restrictions are paid more attention to because of the additional market integration objective which EC competition policy has.

- Second, it reflects the higher importance EC competition policy attaches to intra-brand and intra-technology competition in general. It is considered important to protect intra-brand competition as a useful and sometimes essential complement to inter-brand competition. It is also recognition of the fact that restraints are almost never only affecting intra-brand competition but may also facilitate collusion, especially in cases of cumulative use.

- Third, sales restrictions may be used to prevent arbitrage and support price discrimination between different markets. This will in general lead to a loss of consumer welfare. While some consumers will pay a higher price and others will pay a lower price, collectively consumers will have to pay more to finance the extra profits obtained by the supplier and to cover the extra costs of supporting the price discrimination scheme. Therefore consumer welfare will in general decline unless it can be clearly shown that otherwise the lower priced market(s) would not be served at all and that therefore the price discrimination will lead to an undisputable increase of output. It's only in the latter case that consumer welfare may actually increase.

D. Conclusion

Regulation 1/2003 and the modernization package, the review merger control Regulation and the reviewed TTBE regulation are reforms which aim at improving the effectiveness of our competition policy and at enhancing its real impact in opening and maintaining competitive markets.

This is a goal that we must achieve to ensure that the European Union is able to cope with two major and immediate challenges, namely to guarantee that business and authorities are able to operate under the same competition policy constraints in the enlarged European Union and to make European markets more open and competitive in order to foster sustainable growth.