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*A Practice Focus:* **ANTITRUST LAW**

# A Changed System

*Proposed Reform of European Commission Review Has Foreseeable Problems*

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European competition law is no longer merely a marginal concern for American companies. The rise of global alliances and continuing U.S. investment overseas mean that many transactions must now jump antitrust hurdles on both sides of the Atlantic. The European Commission relishes its growing clout and in recent months has questioned or barred several high-visibility agreements, most of which involved American companies.

The increasing relevance of EC competition law has provoked louder questions about its procedures and organization. The commission is often criticized for delay and rigidity, and many of those complaints are justified.

But the commission has been thinking hard about modernization. In late September, it proposed the most far-reaching changes for competition enforcement since 1962. While mergers and certain joint ventures would not be affected, most other agreements and practices would be subject to quite new procedures. The idea is to eliminate prior approvals and permit some decentralization so that the commission can focus on policy making and high-priority enforcement.

Few quarrel with these goals, but many question the proposed methods. There is a real risk that the changes will lead to greater unpredictability, inconsistent rulings, duplicative proceedings, and varying results. Fortunately, the changes are only in the process of being approved. It is not too late for business to be heard.

## A Clogged Operation

The key competition proposals involve EC Article 81. Article 81(1) prohibits all agreements and practices that affect trade between member states of the European Union and have as their "object or effect" the prevention, restriction, or distortion of competition in the common market. Under Article 81(2), such agreements and practices are automatically void.

The only escape is through an exemption under Article 81(3). Exemptions are permitted if an agreement or practice improves the production or distribution of goods or promotes technical or economic progress, gives consumers a "fair" share of the benefits, does not impose unnecessary restrictions, and does not eliminate substantial competition. The ultimate criterion is the public welfare. Discretion to grant an exemption is wide, and conditions are often imposed.

Currently, only the commission may grant exemptions. Companies are required to notify the commission of a new agreement or practice through an elaborate filing that provides extensive information about the companies, the market, and the transaction. The commission publishes notices, invites comments, and conducts an inquiry. The process is back-logged and painfully slow. Review of a particular transaction can take two or more years. The commission will also issue so-called comfort letters, but a comfort letter offers incomplete protection (as opposed to an exemption) and is itself subject to lengthy delays.

The alternative is for corporations to proceed without any kind of clearance. The risk is that a national competition authority or court might decide, years later, that an agreement is prohibited by Article 81(1) and therefore has been void from the start. The parties will have wasted time and resources, and will risk penalties and damage claims.

The theory behind the current system is that clearances should be granted by a centralized authority that applies uniform standards and may impose conditions in the public interest. To facilitate planning and minimize enforcement, clearances are given in advance. To encourage notification, transactions without clearances are automatically void if they are later found to be restrictive.

The system can be helpful to business. Transactions that pass EC review or receive an exemption may proceed with real certainty. Less happily, companies may also take advantage of the foreseeable delays to make interim use of questionable practices. Frequently, however, the system hinders planning.

Clearances are intolerably slow in coming, and important transactions may need to go forward without their protection.

From the commission's perspective, notifications permit methodical inquiries and the imposition of conditions before an agreement takes effect. But they also absorb scarce resources and divert the commission from policy making and urgent enforcement. As a result, the commission is famously slow in addressing complaints and undertakes relatively few investigations on its own initiative.

To eliminate this bottleneck, the commission proposes three changes. First, except for mergers and full-function joint ventures, notifications would be abolished. Companies would have to judge for themselves whether an agreement offends Article 81(1) and whether it warrants exemption under Article 81(3). Controls would be imposed ex post facto.

Second, enforcement would be decentralized by giving national courts and agencies the power to grant exemptions. Thus, while the commission focuses on high-priority enforcements, more matters would be handled by national authorities.

Third, the commission would impose restrictions designed to discourage inconsistent national policies. If a transaction might affect trade between member states, national authorities would be required to apply EC rules rather than their local competition laws and would have to make "every effort" to adhere to the commission's decisions. They would be linked in a "network," through which they could exchange information and assist one another by conducting factual inquiries. They would also be given the power, which does not currently exist in all member states, to close or suspend an investigation if one is under way in another member state. The commission could intervene in national court proceedings and could foreclose national investigations by opening its own inquiry.

Separately, the commission wants to strengthen its investigative powers. Today it may compel answers to interrogatories and the production of documents, and may make unannounced visits ("dawn raids") to company facilities to seize documents and question employees. The commission wants additional power to make unannounced raids on the *homes* of employees in order to search for sensitive documents.

Also, it wants all employees, and not simply those designated by the company, to be subject to on-the-spot questioning. Their answers could be used as evidence. There would be no express right to the presence of counsel, and national courts would have no real power to intervene. If a company or employee refused to cooperate or provided incomplete or misleading information, the penalties could be as much as 1 percent of a company's annual turnover. If daily penalties were imposed, they could rise to 5 percent of average daily turnover.

A special rule would apply to associations. If the commission imposed a penalty on an association without the resources to pay it, the *entire* fine could be levied against any company that was a member of the association at the time of the violation. Such fines would be limited to 10 percent of a company's annual turnover. No proof would be required that the company actually participated in the violation.

## Can the Center Hold?

This entire package of proposals was developed after an elaborate consultative process. The commission published a White Paper in 1999 and received comments from member states, the European Parliament, the EU's Economic and Social Committee, and many business groups and lawyers. The comments suggest that reforms are likely, although parts of the proposal are controversial, and compromises seem inevitable.

Except for Germany, most member states favor at least some modification of the notification system. Some commentators worry about completely abandoning the system, and Germany questions the commission's power to eliminate it without rewriting Article 81. To keep the door ajar for retaining notification, the commission would be permitted (but not compelled) to adopt a lesser registration requirement for agreements with competitive implications. No one, least of all perhaps the commission, knows how this might work.

The principal fear is that the proposal could produce duplicative national proceedings, in which different countries would apply different rules and procedures, and could easily reach different results. The national agencies could defer to one another, but might not when urgent local interests were at stake. They might use minor factual variations to justify ignoring general EC policies.

To make matters worse, the national agencies differ dramatically in experience, expertise, and levels of activity. Some are well-organized authorities of long standing, while others are only newly established. Some agencies might prove vulnerable to local political pressures. This could invite forum shopping: Companies might deliberately encourage an investigation by a sympathetic agency to discourage inquiries by others.

Similar problems could arise in the national courts, which have little experience in applying EC competition rules. A senior English judge has termed the proposal "horrendous" because, among other concerns, Article 81(3) exemptions, which the courts would surely be adjudicating, are based on ill-defined public welfare considerations rather than "legal" standards.

All this suggests that the commission's hope of decentralizing the process without decentralizing policy making may be impossible. Since one goal of EC competition law is market integration, this could prove a decided step backward.

The proposed strengthening of the commission's investigative powers raises another set of issues. Especially troubling is the commission's lack of concern for the right to counsel. When offices and homes are being raided, documents seized, and employees questioned, surely individuals and companies should be able to confer with their attorneys. Lawyers may indeed "impede" investigations, but those impediments are called due process. Indeed, the commission in practice is often more understanding of the role of counsel, and that practice should be confirmed by unequivocal rules.

Also troubling is the commission's continued refusal to extend the attorney-client privilege to internal legal advice. The commission has sometimes used such advice to prove that a violation was knowing and deliberate. (The European Court of Justice excluded advice from in-house counsel from the privilege in 1982.) Yet in a system of ex post facto controls, such as the one now proposed, companies are forced to rely on their own—and their lawyers'—assessments of a transaction's legality. Why should such legal advice be protected only if provided by outside counsel?

The real problem is that the European Commission has not gone far enough. In the spirit of Rube Goldberg, its reforms add multiple steering wheels and more horns. Rube had undoubted charms, and something like the commission's design skills, but he was not the ideal regulator of a global economy.

More-fundamental changes could produce a more functional system. For example, notifications could be abandoned if Article 81 were rewritten to eliminate exemptions, abolish the rule of automatic voidness, and provide clearly for rule-of-reason analyses. If the commission were given additional resources, decentralization could be avoided. National agencies would enforce national laws, and the commission would apply EU laws to matters with a European dimension. Issues of EU competition law would sometimes arise in national courts, but, just as today, novel questions could be referred to the Court of Justice. Finally, the commission's decisions in both merger and nonmerger cases should be made subject to prompt and probing judicial review.

If all this were done, the European Union would have a workable system for regulating global competition. But none of these changes will happen without pressure from business. The next ox to be gored may be theirs, so companies active in Europe should grab this opportunity to say clearly what kind of antitrust enforcement they believe will best promote economic progress. They may wait another 38 years for a similar chance.

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