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Editorial - Reforming EU Competition Law

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The past year has been one of reflection for the European Commission; engaged in extensive exercises of reviewing Regulation 1/2003 and the vertical restraints regime. The ratification of the Lisbon Treaty in December 2009 and the end of Neelie Kroes's tenure as Commissioner for Competition, have also caused many to take stock of how well the European competition enforcement regime has been operating, as well as future directions and possible reforms. This editorial will first set out some of the most important reforms, then give a short narrative to each of the papers published in this issue of Competition Law Review.

EU competition law underwent a number of fundamental changes in the last decade. The Modernisation Regulation, Regulation 1/2003, abolished the cumbersome notification system and allowed Article 101(3) TFEU (formerly 81(3) EC) to be applied by national competition authorities and courts for the first time.[1] This coincided with an ambitious expansion of the Union to the East. With significant resources and time freed up to focus on the most serious breaches of EU competition law, the Commission's armoury gained stronger powers to investigate and punish infringements. Article 20 of Regulation 1/2003 provides that Commission officials can conduct unannounced dawn raids. It sets out powers to enter premises, examine physical and electronic records, make copies of those records, seal business premises and records and question 'any representative or member of staff of the undertaking' (Art 20(2)(f)). The case law suggests that legal privilege may only cover documents involving external counsel, and not in-house lawyers; meaning that there are very few limits to records the Commission can access.[2] Significantly, the Commission's search powers under the Modernisation Regulation are not restricted to the premises and documents held by the undertakings. Article 21(1) provides:

> If a reasonable suspicion exists that books or other records related to the business and to the subject matter of the inspection, which may be relevant to prove a serious violation of [Article 101 or Article 102] of the Treaty, are being kept in any other premises, land and means of transport, including the homes of directors, managers and other members of staff of the undertakings and associations of

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1 Commission Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty, OJ 2003, L1/1.

2 Case 155/79 *AM and S Europe* v *Commission* [1982] ECR 1575; Case T-125/03 R *AKZO Nobel ChemicalsLtd* v *Commission* [2003] ECR II-4771, [2004] 4 CMLR 15.

undertakings concerned, the Commission can by decision order an inspection to be conducted in such other premises, land and means of transport.

Subject to the consent of national courts, national competition authorities are required to provide the Commission with 'necessary assistance, requesting where appropriate the assistance of the police or of an equivalent enforcement authority so as to enable them to conduct their inspection' (Art 20(6)).

Article 7 of the Modernisation Regulation gives the Commission the power to impose structural remedies in order to bring an infringement of competition law to an end. Although the Commission had in the past frequently imposed *behavioural* remedies (particularly in bringing an end to an abuse of dominance), there was no mention of *structural* remedies in Regulation 17/1962 (which preceded the Modernisation Regulation). The potential use of structural remedies is limited to situations where 'there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking' and where 'there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking' (recital 12, Reg 1/2003), but it nevertheless constitutes a significant addition to the Commission's powers.

Article 9 of the Regulation allows the Commission to accept commitments in lieu of a full or formal decision; a form of direct settlement. These *commitment decisions* are akin to US consent decrees. They are appropriate 'where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment' (Art 9(1)), but not where the Commission would otherwise intend to impose a fine (recital 13). Fundamentally, these decisions do not constitute an admission of guilt; they do not prevent European competition authorities from perusing an infringement; and they do not require undertakings to waive their rights of appeal. Commitment decisions have been reached in a number of cases; notably *Bundesliga* and *Coca-Cola*.[3] The efficiency with which settlements are reached in US antitrust cases, also inspired the Commission to adopt a system of direct settlement in cartel cases. Although this is very different to the US system of plea bargaining, it serves the same purpose: to expedite enforcement and free up resources to deal with more cartel cases.[4] Settlements encourage undertakings to engage in a streamlined procedure in return for an additional discount to their fine.

The last ten years have seen the Commission press on with cartel investigations, imposing over €2 bn in cartel fines during 2008 alone. More controversially, the Commission has also continued to ratchet up enforcement against abusive conduct under Article 102 TFEU (formerly 82 EC). Following on from their earlier decisions in

[3] Commission Decision of 19 January 2005 (Case COMP/C.2/37.214 — Joint selling of the media rights to the German Bundesliga) OJ 2005, L134/46; Commission Decision of 22 June 2005 (Case COMP/A.39.116/B2 — Coca-Cola) OJ 2005, L253/21.

[4] Commission Regulation 622/2008/EC of 30 June 2008 amending Regulation (EC) No 773/2004 as regards the conduct of settlement procedures in cartel cases, OJ 2008, L171/3.

Magill and *IMS Health*, the Commission forced the compulsory licensing of intellectual property rights in the case of *Microsoft*. Although the aims of competition law and IP are essentially the same (innovation, efficiency, welfare…), IP falls into natural conflict with competition law by creating fixed-term monopolies protected by patents and copyright. In Microsoft's case, the refusal to supply its IP protected interoperability codes (although the result of expensive investment) was viewed by the Commission as protecting Microsoft's virtual monopoly power, by preventing competition in adjacent operating system markets. Many have viewed the interference of those IP rights by competition law as damaging the incentives for future investment in research and development, as well as constituting a fundamental interference with private parties' freedom to dispose of their property as they wish.

This issue of Competition Law Review contains four insightful papers which explore research questions at the heart of the changes outlined above.

'The Impact of Regulation 1/2003 in the New Member States' assesses the impact of Regulation 1/2003 on the new member states situated in Central and Eastern Europe, who joined the Union in 2004 and 2007. The paper focuses on those economies in transition from soviet block command economies to liberalised free market economies. It notes a general convergence of substantive rules, but with some differences, such as in relation to unilateral conduct. However, whereas competition law has been added to statute books, there appears to be little effective enforcement within these member states. Moreover, the paper finds that national competition authorities show a good level of competence in competition law, but national judges appear to be struggling to deal with competition law cases in an effective manner. The paper calls for further research to monitor developments in these member states.

'A Missing Step in the Modernisation Stairway of EU Competition Law – Any Role for Block Exemption Regulations in the Realm of Regulation 1/2003?' undertakes a conceptual analysis of the continued use of, both general and industry specific, block exemption regulations in this era of modernisation. It sets out how these 'relics' from the years of individual notification are incompatible with spirit of the modernisation regulation, as well as the move to a more 'effects-based' analysis of competition law cases. In particular, hinging the vertical restraints block exemption (Regulation 2790/99) on market shares may provide some level of simplicity and certainty for undertakings.[5] On the other hand, it may distort markets and distract from the more pressing need to clarify the exact scope of Article 101(1) and the application of Article 101(3).

'Counting Down Regulation 1400/2002 – Questioning the Logic of Sector-Specific Rules for the European Car Industry' focuses on the continued differential treatment of the European car industry. Whereas the previously special treatment of certain industries (such as shipping liner conferences) has been brought into line with

[5] Commission Regulation 2790/1999/EC of 22 December 1999 on the application of Article 81(3) of the Treaty to Categories of Vertical Agreements and Concerted Practices, OJ 1999, L336/29.

mainstream EU competition law, vertical agreements in the car industry continue to be treated more restrictively than those falling under the general block exemption regulation. Regulation 1400/2002 on motor vehicle distribution was meant to expire on 31 May 2010, but it has been extended by the Commission, with indications that the more restrictive approach to vertical agreements in this industry is likely to continue for some time. The motivation behind special controls of car distribution stem from concerns about the uniquely high service and repair costs incurred by purchasers of new cars, coupled with a lack of intra-brand competition at the retail level. The tendency for car distribution agreements to segment sales along national lines, with significant price differentials and restrictions on sales to buyers in other member states, were also of great concern. The present paper questions the wisdom of continuing the differential treatment of a specific industry, arguing that the block exemption regulation effectively fragments the EU competition law enforcement regime.

'Between Economic Freedom and Effective Competition Enforcement' focuses on the impact of antitrust remedies provided by the Modernisation Regulation on firms' enjoyment of property and freedom to choose who they contract with. Although the modernisation regulation set out structural remedies for the first time, it is the Commission's continued use of behavioural remedies in Article 102 cases which raises controversy. The Commission's decision in *Microsoft* and successful defence before the Court of First Instance (now the General Court) is seen by many as granting the regulator with carte blanche to interfere with the IP rights of dominant firms as they see fit. A particularly troubling aspect of the decision, was the Commission's failure to address the 'new product' criterion set out in existing case law. In *IMS Health,* the requirement that failure to license the IP rights would prevent a 'new product' from entering the market, was viewed as important to striking the right balance between effective competition and the need to protect incentives for innovation.[6] The criterion was ignored in the Commission's decision. The CFI took a surprisingly loose view of it, given its prominence in the case law. They essentially said that 'new product' did not apply where the refusal to supply limited technical development, and therefore *IMS* criteria was not necessarily restricted to preventing a competitor from introducing an entirely new product.[7] The widened application of this far reaching behavioural remedy was reaffirmed in the Commission's guidance on the enforcement priorities of Article 102.[8] This paper argues that this area of enforcement may fall well short of the standards of protection of the right to peacefully enjoy one's property and freedom of contract, provided by the European Convention on Human Rights (ECHR). It considers possible alternative approaches which effectively protect competition, while adhering to ECHR principles.

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6 Case C-418/01 *IMS Health GmbH & Co v NDC Health GmbH & Co* [2004] ECR I-5039.

7 Commission Decision of 24 May 2004, C (2004) 900, OJ 2007, C32/23, para 710-711.

8 Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, C(2009) 864C (final), 9 February 2009

Our final paper 'This is not the time to be tinkering with Regulation 1/2003' calls for the fundamental reform of EU Competition Law enforcement, identifying serious concerns about due process in the era of Regulation 1/2003. Hearing Officers are meant to play a central role as 'guardians of fair proceedings before the Commission'.[9] Before 2001 these were recruited from the ranks of Commission officials, but although they are now independent, they can at best make non-binding recommendations to the Commissioner for Competition. The only other external scrutiny of Commission decisions before appeal, comes from the Advisory Committee on Restrictive Practices and Dominant Positions (Article 14). This Committee is consulted before the Commission adopts a final decision and is made up of representatives from national competition authorities. However, its purpose is not to protect the interests of undertakings, but the interests of member states. These hardly provide effective scrutiny of the Commission as it builds its case. Firms are of course free to appeal any Commission decision; the fact that each Article 101 decision typically results in five or six appeals, suggests that undertakings are left less than satisfied from their treatment by the Commission. However, the main concern stems from the Commission's combined roles of investigator judge and jury. Although the Commission imposes administrative fines through a civil procedure, the size and punitive dimension of these fines (in the most serious infringements at least) makes them unmistakably criminal in character. They may very well be treated as criminal for the purposes of Article 6 ECHR (right to a fair trial). This paper provides an excellent discussion of these issues and explores possible alternative models of enforcement which would ensure EU Competition Law complies with the ECHR.

[9] Commission Decision 2001/462/EC, ECSC of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings, OJ 2001, L162/21 at 2.