

**1 May 2004**

**The fifth EU Enlargement  
Major revisions to EC Competition enforcement practices**

Much is being written about this day in the Press and around the World. Too much to read it all. Rather than attempt to capture the many related issues, we prefer to select a few points which appear to us particularly important (and offer links to some relevant information sources):

First, why is 1 May 2004 so important? The main reason is because, as the European Union “enlarges” to include 10 new Member States, this will be a great day for democracy in Europe. Once again the EU will admit countries which had been under non-democratic control in the recent past. A bold initiative which has worked before to stabilize the countries concerned with a myriad of economic and social links. This is hugely welcome. ([Commission’s website on Enlargement](#))

Secondly, 1 May 2004 is important because it involves a scale change in EU growth. The EU will grow to be the world’s largest economic area, bringing new markets and opportunities for competition and even greater breadth of diversity. This should be very welcome, both for old EU Members and the new, acceding States (Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia and the Czech Republic), although clearly it will require adaptation by all. It will also have great consequences for the EU’s political and trading partners.

Thirdly, 1 May 2004 is important because there are fundamental changes in the way that EC competition law will be enforced. For example:

- From 1 May 2004, national competition authorities and national courts in the EU of 25 will be able to apply all of Article 81 of the EC Treaty, the basic article on anti-competitive agreements and restrictive practices. What this means is that the decision to accept arguments against or justifications for such agreements will not just be a question of administrative authorities. Our advices will have to focus less on the particular policy of a particular official or authority and more on whether objective criteria are met and proven with appropriate evidence, so that any competition authority or court dealing with the case would find an infringement or would be likely to clear the restriction in question under Article 81(3) EC. Potentially, a major change even though the European Commission will still have a special position at the centre of it all.
- From 1 May 2004, European Commission inspectors will be able to visit the private homes of executives to look for cartel documents, as EU powers are reinforced. Various procedures are required before they can do so, but the key point is that EC “dawn raids”, as they are known in competition lawyers’ jargon, are no longer just on company premises. Time to move away from the cliff edge, if you have not already done so. ([Council Regulation 1/2003 of 16 December 2002](#))
- From 1 May 2004, mergers and acquisitions can be blocked in EC law without proving dominance. A revised [EC Merger Control Regulation](#) comes into force, bringing a new substantive test, the so-called “SIEC test” (“significant impediment to effective competition”). The key point is that the new EC merger test is not only concerned with an assessment of dominance by one of more firms but can also cover the anti-competitive effects of non-coordinated behaviour of non-dominant companies. For example, where two adjacent petrol stations on a

motorway come under common control, the owner of both may have the ability to raise prices, even though on normal market definitions he may not be dominant. In future, the European Commission may be able to intervene in such cases, widening its control. This is new, complex and controversial and may lead to much uncertainty for a few years until we have a clearer idea how the SIEC test works and what will be considered a "significant" effect.

(See also, [Special edition of the Commission's Competition Policy Newsletter](#) and a copy of a recent speech on "EC Competition law and May 2004 - The Impact on the Czech Republic", which is attached.)

We also draw your attention to a two-day conference on EC Competition modernisation and decentralised enforcement, organized by the Global Competition Law Centre in Bruges, to be held on 10 and 11 June 2004 ([program and details](#)). Our firm is one of the sponsors of the conference.

Fourthly, 1 May 2004 will bring important changes to the EC competition rules governing the licensing of technology, such as patents, know-how and computer software.

- From 1 May 2004, new rules come in, changing the applicable analytical approach. If restrictive agreements are between competitors and involve a market share of more than 20% held by the parties together on the relevant product or technology market, the agreements should be reviewed and may have to be materially revised under new Guidelines. The position is similar for restrictive agreements between non-competitors, where either party by itself has more than 30% market share on a relevant market. In both cases, checks will have to be made to ensure that serious (so-called "hard-core") restrictions are not included, which normally prevent any clearance.
- Moreover, companies with high market shares will face greater legal uncertainty and potentially stricter regulation. Some agreements may have to be renegotiated or terminated by the end of the transitional period for the new rules in 2006. (New block exemption [regulation](#) and [guidelines](#) on technology transfer agreements).

Finally, 1 May 2004 also means that the EU's common trade policy will fully apply to the 10 new Member States. For example:

- From 1 May 2004, trade defence instruments (anti-dumping, anti-subsidy, safeguards) currently imposed by the 10 new Member States cease to be in force. All current EU measures will now also cover the new Member States. These measures are still based on calculations and assessments (injury, dumping margins) based on the 15 pre-accession Member States. They do not take into account the often lower cost production in the new Member States. ([EU and new Member State measures](#)) While there will be no automatic review of these measures, importers have the possibility to request a [review procedure](#) that may lead to adjustments or even cancellation of existing measures. Conversely, domestic producers may also need to adjust their strategies to the new post-Enlargement situation. ([Overview of some of the consequences of Enlargement for trade defence instruments](#))
- Also on the trade front, Enlargement will affect trade sanctions imposed in retaliation against US non-compliance with the WTO rulings in the US - Foreign Sales Corporations case. (["FSC" Regulation 2193/2003 of 8 December 2003](#)). These retaliatory FSC duties came into effect on 1 March 2004 and are now at 7% *ad valorem*, to be raised by 1% per month until a general review in March 2005. Their expansion to imports into the 10 new Member States will have some unexpected consequences. While Enlargement will not cause the EU to reach the maximum levels of sanctions it may impose (duties of up to 100% *ad valorem*,

for a maximum about US\$ 4 billion in imports), it will lead to a sudden increase in the total level of sanctions imposed from one day to the next. Also, the list of products to which the FSC sanctions currently apply was established in close consultation with stakeholders (importers, exporters, producers, consumers) in the 15 old Member States to avoid undue harm to the EU's own commercial interests. 1 May 2004 means that the harmful effects of these sanctions will also be felt by importers, users and consumers in (as well as exporters to) the 10 new Member States, who have never been consulted about this.

There are more changes to come. Next month at the first summit of the 25 EU Member States, the new European constitution ([Draft Treaty establishing a Constitution for Europe](#) prepared by the [Convention](#)) is scheduled to be approved by the EU Heads of Government. That summit will be held in Brussels, on 17 and 18 June. On 21 June, our firm will be co-hosting a mini-conference on the European Convention in Brussels, with eminent speakers from Europe and the United States. You are cordially invited to attend ([program and details](#))

This bulletin has been prepared by John Ratliff, Marco Bronckers, Axel Gutermuth and Naboth van den Broek.

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