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27 October 2000

COMMISSION PROPOSES WIDE RANGING REFORMS TO THE CURRENT SYSTEM OF COMPETITION LAW ENFORCEMENT

In September 2000, the Commission published a proposal for a Regulation which would make fundamental changes to the current system for the implementation of the EC competition rules. If adopted, it will be the most significant piece of Community legislation in competition law since the Merger Control Regulation in 1989.

The Commission's goal is to abolish the current notification system and to decentralize the enforcement of the EC competition rules in order to concentrate on the most serious violations, in particular cartels. The reform is also designed to organize the Commission for further expansion of the European Union, in which a centralized notification and exemption system may well be unworkable.

The pillars of the new system are: (i) the direct application of Article 81(3) EC by national authorities and courts; (ii) the creation of a competition network of the Commission, national authorities and national courts which will apply the EC rules; and (iii) the extension of the Commission's investigative powers.

First, Article 81(3) EC will be directly applied by national competition authorities and courts. This means that, if an agreement or practice complies with Article 81 EC as a whole, taking into account the grounds for clearance in Article 81(3) EC, it will be considered valid and enforceable (without the need for notification to the Commission which is required at present). At present only the European Commission can grant exemption based on the grounds in Article 81(3) EC.

Second, a competition network will be set up among the Commission and the different national competition authorities with a system of close cooperation and exchange of information between them. Thus, national authorities are required to inform the Commission prior to the adoption of prohibition decisions, decisions accepting commitments and decisions withdrawing the benefit of a block exemption. The Commission will also retain the power to take over a case and do it itself in some circumstances (such as where it considers that the direction taken by a national authority deviates from its own policy). When the Community public interest so requires, the Commission can also issue a decision finding that Article 81(1) EC is inapplicable. This power is intended to be used to establish key precedents. National competition authorities must also keep each other informed of all new cases and exchange relevant case-related

information. As regards national courts, there will also be cooperation. In particular, the Commission will have the power to intervene and offer submissions as a form of amicus curiae, and national courts are requested to avoid decisions conflicting with those of the Commission.

Third, the draft considerably increases the Commission's powers of investigation by allowing the Commission to take oral statements and use them as evidence, conduct searches of private homes, and to seal offices to ensure that documents are not removed during an inspection. The Commission would also be empowered to ask oral questions during so-called "dawn raids" - inspections on company premises. Such questions could be directed to explanations relating to the subject matter of the investigation (as opposed to questions solely concerned with documents found, which is the currently accepted standard).

The proposal is still very controversial but already has much political momentum. Member States are clearly not keen to reduce the scope of (often newly developed) national competition laws and therefore do not like the fact that EC Competition law is to apply to the exclusion of national law. Companies are concerned that there will be less legal certainty with no notification procedure and many different authorities applying the rules. The Commission has also said it will only give advisory opinions in exceptional cases (and has no more than a dozen such opinions a year in mind). Practitioners are also concerned that there will be forum shopping between different authorities (e.g. in cartel enforcement or selection of the authority to which to complain), and that the courts will not be able to handle Article 81(3) EC assessments effectively.

The proposed draft will have to be adopted by the Council in consultation with the European Parliament. It is widely expected that the reform will not enter into force before 2003, but that the proposals will ultimately be introduced (albeit in modified form).

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