Council of the EU Adopts Major Antitrust Law Reform

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Based on a proposal by the European Commission, on November 26, 2002 the Council of the European Union adopted the most comprehensive reform since 1962 with respect to procedures to be followed for ensuring the compliance of individual license, distribution, research and related agreements with EU antitrust law. Effective May 1, 2004, the reform will make significant changes to Regulation No. 17 of 1962, which has since 1962, without major changes, provided the procedural rules under which the EU Treaty's Articles 81 and 82 are enforced with respect to agreements which restrict competition.

Fundamentally, the reform attempts to enhance enforcement by simplifying procedures. Companies will no longer have to notify the European Commission with respect to individual agreements in order to obtain clearance or exemption under the EU's antitrust rules. Under the current Regulation 17, companies are required to notify the Commission with respect to agreements which restrict competition and which do not fall within the safe harbors created by various block exemptions, such as Reg. No. 2790/1999 on Vertical Agreements, Reg. No. 240/1996 on Technology Transfer and Reg. No. 2659/2000 on Research and Development.

In the past, these procedural requirements resulted in the EU Commission receiving notice of an enormous number of agreements. It is widely acknowledged that continuing this system of notification and clearance/exemption for individual agreements would not be workable when the EU expands from 15 to 25 Member States in 2004, with the addition of Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic and Slovenia.

Furthermore, as we discussed in our January 8, 2001 Internet Alert, when the Vertical Agreement block exemption was issued in 1999, for the first time, the market share of the parties became relevant in determining whether the safe harbor is available. The safe harbor under that block exemption is not available if the supplier's market share exceeds 30% or, in exclusive supply arrangements, the buyer's market share exceeds 30%. For companies that offer goods and services that are often promoted as having no competitive alternatives, it is sometimes difficult, under the current block exemption approach, to prove that relevant market shares are less than 30%.

The Council's reforms replace the current system with a system that offers directly applicable

exceptions, based on the judgment of the companies involved rather than a decision of the European Commission. Under the new system, companies are freed from the requirement that they notify the European Commission of their agreements. Those agreements will automatically be valid as long as the criteria for exemption in Article 81(3) are met:

> The provisions of paragraph 1 [Article 81's prohibition of restrictive agreements] may, however, be declared inapplicable in the case of:
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> - any agreement or category of agreements between undertakings [companies];
> - any decision or category of decisions by associations of undertakings; [and]
> - any concerted practice or category of concerted practices;
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> which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
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> (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; [or]
>
> (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

A central pillar of this reform is the increased role of national competition authorities. They are, along with the European Commission, enforcers of EU competition rules. By May 1, 2004, the EU will establish the so-called network of European Competition Authorities (ECN). The goal of this network will be to ensure that antitrust rules are enforced in a consistent manner throughout the 25 EU Member States.

The EU Commission intends to issue a number of Notices in order to explain and clarify certain key issues of this reform and to thus assist companies in evaluating their agreements in light of the EU competition rules.

This reform does not affect the requirements under the current rules governing merger control. Mergers which have a "community dimension" as defined in the Merger Regulation must still be notified to the European Commission.

The new system puts more responsibility in the hands of the companies, who will need to ensure themselves that their agreements do not restrict competition or, in case they do, that these restrictions qualify under the Article 81 (3) criteria. In this sense, the new system will resemble the general enforcement approach followed in the United States, where companies in a vertical relationship (e.g., suppliers and distributors) enter into various restrictive contractual provisions based not on clearance from a government agency, but rather, based on the companies' belief that,

if they were ever challenged, a court or administrative agency would ultimately conclude that the pro-competitive benefits of the agreement outweigh any anticompetitive effects (under the so-called rule of reason).

In shifting this determination of what is reasonable under competition law from the European Commission to the contracting parties themselves, the ultimate goal of this reform is to streamline procedures without sacrificing underlying competition principles. Of course, no one will know until well after May 1, 2004 how achievable that goal will be.