E U R O P E A N E C O N O M I C A R E A

J O I N T P A R L I A M E N T A R Y C O M M I T T E E

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REPORT

and

RESOLUTION

on

New competition policies in the EEA

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I INTRODUCTION

1. Article 81 of the EC Treaty prohibits agreements and practices between companies, which might affect cross-border trade and restrict competition (e.g. price fixing and market sharing). An agreement which restricts the competition between enterprises is prohibited *per se*. However, there is a possibility for exemptions if the agreement in question meets certain conditions. Article 82 of the EC Treaty prohibits the abuses of a dominant position in the market (e.g. imposing unfair prices and limiting production). When there is an abuse of a dominant position, no exemption can be granted.

2. On 27 September 2000, the European Commission adopted a proposal for a new Regulation to replace Regulation 17/62 implementing Articles 81 and 82 of the EC Treaty. The proposal is intended to replace the current system of administrative authorisation, centralised at Commission level, by a decentralised system in which not only the Commission, but also the national authorities and courts will be able to apply Article 81 in full. National authorities and courts may already apply Article 82 in full. It should be noted that the proposed reform concerns the procedural competition rules, and not the substance rules themselves.

3. The process of reforming the current enforcement system started by a Commission White Paper, adopted April 1999, mapping out the broad lines of the proposed reform. The Commission received submissions from all Member States and more than 100 interested parties, including submissions from the EEA EFTA States and the EFTA Surveillance Authority. A working group composed of Commission officials and experts from the national competition authorities, including the EEA EFTA States, had discussed the content of the White Paper in a number of meetings. After having been adopted by the Commission, the proposal is currently in the Council. The Commission's aim is to have the reform in force during 2003

4. The EEA Agreement lays down an obligation for all parties to the Agreement to ensure a homogeneous EEA with equal conditions of competition throughout the whole EEA. Accordingly, new EC legislation in the field of competition should, to the extent it is EEA relevant and subject to necessary EEA adaptations, be incorporated into the Agreement. The EEA Agreement is also currently based on a system of centralised enforcement of the competition rules. If finally adopted, the reform of Regulation 17/62 should be incorporated into the EEA Agreement and in a way that ensures equal conditions of competition throughout the EEA.

5. It would seem that decentralised application as proposed in the new regulation may be implemented into the EEA Agreement by amending the Protocols to the Agreement, and in particular Protocols 21 (on the implementation of competition rules applicable to undertakings) and 23 (concerning the cooperation between surveillance authorities) to the Agreement, and would not require amendments to the Main Part of the Agreement. Once the reform has been finally adopted by the Council of the European

Union, the incorporation of the new regulation would follow standard procedures for integrating new, EEA relevant EC legislation into the EEA Agreement.

II BACKGROUND FOR THE REFORM

6. The rules that set out the procedure for application of Articles 81 and 82 of the Treaty were adopted in 1962, and have been applied until today without any significant modifications. Whereas the Commission, national authorities and national courts can apply the prohibitions laid down in these articles, it is only the Commission that has the power give *exemptions*. The system was well suited for a Community of six Member States and allowed the development of a consistent Community competition law.

7. The Commission found that the current has two major weaknesses.

- Firstly, the current system no longer ensures the effective protection of competition. The Commission believes that its monopoly is a significant obstacle to the effective application of the competition rules by national competition authorities and courts. Moreover, the notification system is no longer an effective tool for the protection of competition as it only rarely reveals cases that are a real threat to competition.

- Secondly, the current system imposes an excessive burden on industry by increased compliance costs and by preventing companies from enforcing their agreements without prior notification to the Commission, even if they fulfil the conditions for an exemption.

III THE MAIN CHARACTERISTICS OF THE REFORM

8 The proposed reform amends extensively the arrangements for implementing Articles 81 and 82 of the Treaty. The present system establishes a strongly centralised system of authorisation for all restrictive agreements falling under the scope of the prohibition in Article 81(1) EC, and which require an exemption based on Article 81(3) EC. Both national courts and Member States' competition authorities may, like the Commission, apply Article 81(1) as well as Article 82 EC, but the Commission holds monopoly over the application of Article 81(3). Thus, the Commission is the only body empowered to grant exemptions on prior notification of the restrictive agreements and practices that satisfy the conditions of Article 81(3) EC.

9. The core of the reform is the removal of this monopoly power of the Commission. It is proposed to create a new enforcement system referred to as a "directly applicable exception system". In such a *decentralised* enforcement system, both the prohibition set out in Article 81(1) and the exception contained in Article 81(3) can be applied not only by the Commission, but also by national courts and national competition authorities. This

means that agreements are legal or void depending on whether they satisfy the conditions of Article 81(3) and that no authorisation decision will be required for enforcing agreements complying with Article 81 as a whole. This is already the existing enforcement system for Article 82 of the EC Treaty.

10. By proposing this reform the Commission aims at increasing the protection of competition in the interest of consumers, creating a more level playing field and to reduce bureaucracy for businesses.

IV THE COMPETITION REGIME IN THE EEA AGREEMENT

11. The framework for competition rules in the EEA Agreement is laid down in Articles 53-65 of the EEA Agreement. Articles 53-59 (supplemented by Protocols 21-25 and Annex XIV) contain competition rules applicable to *undertakings*. As to the substantive competition rules, the competition regime of the EEA is based on existing EC rules. Articles 53, 54 and 59 EEA, often referred to as the *antitrust rules*, correspond to Articles 81, 82 and 86 of the EC Treaty. This framework remains unchanged by the proposed reform, which only deals with *procedural* competition rules i.e. the *enforcement* of the rules themselves.

12. With regard to the *procedural* competition rules, the Commission and the EFTA Surveillance Authority share the responsibility of applying the substantive rules contained in Articles 53 to 59 of the EEA Agreement, (in accordance with attribution rules set out in Articles 55, 56 and 57 EEA).

13. The surveillance mechanism under the EEA Agreement is arranged in a "two-pillar structure", whereby the implementation and application of the EEA Agreement within the Community is monitored by the Commission whereas the EFTA Surveillance Authority carries out the same task within the EFTA pillar. In order to ensure a uniform surveillance throughout the EEA the two bodies co-operate under Protocol 23 to the EEA Agreement, exchange information and consult each other on relevant policy issues and individual cases.

14. In accordance with Article 55 EEA the Commission and the EFTA Surveillance Authority shall ensure the application of the principles laid down in Articles 53 and 54 EEA. Article 56 EEA establishes a one stop-shop principle, whereby either the Commission or the EFTA Surveillance Authority has jurisdiction in any individual case under Articles 53 and 54 EEA.

15. Where trade is affected both within the Community and in the territory of the EFTA States, Article 56(1)(c) provides that the Commission is competent in all cases where trade between EU States is affected to an appreciable extent. The EFTA Surveillance Authority will be competent in cases in which trade between EFTA States and only one of the EU Member States is affected, provided that a set turnover threshold

in Article 56(1)(b) is met within the EFTA territory. These cases are commonly referred to as cooperation cases or *mixed cases*.

16. When a case is viewed as a mixed case, certain co-operation procedures are provided for under the EEA Agreement. Article 58 EEA sets out the principle that the two surveillance authorities must co-operate in order to promote a uniform surveillance throughout the EEA. Protocol 23 EEA regulates the cooperation procedures between the Commission and the EFTA Surveillance Authority in these cases.

17. Competition cases in the Commission in 2000 showed the number of new cases to 1206, of which 564 were in the area of state aid control, 345 were merger notifications and 297 were antitrust cases i.e. Articles 81 and 82 cases. On 31 December 1999, there were 35 competition cases pending with the EFTA Surveillance Authority. 28 cases related to the application of Articles 53 and 54 of the EEA Agreement. Of these, 12 were based on notifications and 15 involved formal complaints. In addition the Authority continued its ex officio case, being its sector inquiry in telecommunications. It had also under consideration seven cases relating to the application of Article 59 (State measures) in combination with Articles 53 and/or 54 of the EEA Agreement.

18. From 1 January to 31 December 2000, 11 additional cases were opened, of which one raised Article 59 issues (public undertakings). Nine of the new cases were opened on the basis of formal complaints and two on the basis of a notification. During the same period, eight cases were closed. Thus by the end of 2000, 38 cases were pending, of which six raised Article 59 issues.

19. 34 cases in which the EFTA Surveillance Authority became involved in 2000 under the EEA co-operation rules concerned the application by the European Commission of Articles 81 and/or 82 of the EC Treaty, together with the corresponding provisions of the EEA Agreement (Articles 53 and/or 54).

V INCORPORATION OF THE REFORM INTO THE EEA AGREEMENT

Point of departure

20. In order to ensure a homogeneous European Economic Area, the reform should be extended to cover the EEA. At this stage, from a legal point of view, it would seem that the reform may incorporated into the EEA by amending the Protocols to the EEA Agreement, and that amendments to the Main Part of the Agreement would not be required. However, the proposed reform raises certain specific EEA issues, particularly in relation to decentralised application of the competition rules, which need to be resolved.

21. With regard to incorporation of the reform into the EEA Agreement, attention should be paid to certain important principles that are laid down in the EEA Agreement. Firstly, the EEA Agreement lays down an obligation for all parties to the Agreement to ensure that equal conditions of competition apply throughout the EEA. Secondly, the Agreement lays down procedures ensuring, *inter alia*, a satisfactory level of co-operation between the EU and EFTA pillar in the enforcement of the EEA Agreement, as well as in legislative and policy matters. With regard to the enforcement of Articles 53 and 54 EEA, such procedures are laid down in Protocol 23 EEA. Incorporation of new legislation into the EEA should therefore respect the level of co-operation laid down in Protocol 23.

Comments from the EEA EFTA States

22. Against this background, the EEA EFTA States submitted their comments to the Commission on 30 September 1999. The main conclusions in the EEA EFTA position were as follow:

The EEA EFTA States

- agreed that there is a need to reform the current regime to strengthen the enforcement of Community competition rules;
- supported that the reform should be based on a directly applicable exception system, an ending of the notification system, and decentralised application of Articles 81 and 82 of the Treaty;
- stressed that, in order to ensure a homogenous EEA, the reform should also be extended to cover the EEA;
- pointed to the fact that the proposals in the White Paper raised specific EEA related issues, particularly in relation to decentralised application of the competition rules, which must be resolved and, in this respect,
- stressed that since decentralised enforcement is a fundamental and integrated part of the proposed reform, it is important that all national competition authorities are empowered to apply Articles 53 and 54 EEA, and
- concluded that the decentralisation should also comprise of the so-called co-operation cases under Article 56 EEA.

Application of Articles 53 and 54 EEA by national competition authorities

23. Decentralised enforcement of EC competition rules by national competition authorities is fundamental part of the proposed reform. Thus, if the reform is also going to work according to its intentions in the EEA, it would seem necessary that all EEA Member States, and not only the EEA EFTA States, should empower their national competition authorities to apply Articles 53 and 54 EEA, if they have not already done so.

24. If the EU Member States are not empowered to apply Articles 53 and 54 EEA, this might, at least, have two consequences. Firstly, it might lead to a situation whereby Articles 53 and 54 are applied to a lesser extent than today, since the Commission regularly applies EEA competition rules when applicable. A consequence of Articles 53 and 54 not being applied would be that the EEA co-operation procedures in competition cases under Articles 53 and 54 EEA established by Protocol 23 EEA would not be applied. This could hamper the Parties' rights under the EEA Agreement. Furthermore, it may lead to a situation where all sides of a case are not sufficiently clarified and taken into account.

25. Secondly, if the EU Member States are not empowered to apply Articles 53 and 54 EEA, this might prevent decentralised enforcement of cases where only Articles 53 and 54 EEA are applicable, and not Articles 81 and 82 EC.

Practical aspects of the incorporation of the reform into the EEA

26. When considering the practical aspects of the incorporation of the reform into the EEA, two issues have been particularly pointed out

- the need to identify Articles 53 and 54 cases;
- the need to maintain the present level of cooperation between the two pillars in cooperation cases;

Identification of Articles 53 and 54 cases

27. A prerequisite to co-operation between the pillars is that the cases in which there is to be co-operation are identified. Pursuant to the current system, it is for the surveillance authorities to apply Articles 53 and 54 EEA, as well as to identify whether or not a case falls under the co-operation procedures of Protocol 23.

28. Even today, not all cases falling under the co-operation procedure have, in practice, been identified as such. However, as the present system is largely based on notifications and publications in the Official Journal, both the EFTA Surveillance Authority and the Commission have the possibility, to a certain extent, to intercept such non-identified cases.

29. In the new system, the application of the competition provisions will, to a great extent, be decentralised to a large number of authorities. Thus, it is assumed that it is more likely that an EEA dimension will be overlooked. Moreover, the notification system will be abolished under the new system, which will largely be based on complaints and ex officio procedures. Consequently, there is a need to find satisfactory procedures to ensure the identification of Articles 53 and 54 cases.

Maintain the current level of cooperation between the Contracting Parties

30. Pursuant to Protocol 23 EEA, the other surveillance authority and the States within its territory have the right to participate in the enforcement, by the competent surveillance authority, of a case fulfilling the co-operation criteria, at all stages of the proceedings.

31. The procedures relating to a priori control and notifications will no longer be suitable under the new system. The reform will require new procedures for the co-operation between the two surveillance authorities. New procedures are also required for the co-operation between the surveillance authorities and the national competition authorities, including the relationship between the competent surveillance authority and national authorities on the territory of the other surveillance authority. Moreover, the reform will require provisions for the horizontal co-operation between national competition authorities, including co-operation between national authorities across the pillars.

The network of competition authorities

32. It is an integrated part of the reform that the Commission and national competition authorities form a network of public authorities. In this network, the Commission and the authorities will cooperate and work closely together in order to ensure an efficient allocation of cases and a consistent application of EC competition rules. The network shall provide an infrastructure for mutual exchange of information and discussion. In order to work efficiently, an exchange of confidential information will take place between all members. The new regulation provides for exchanges of information both between the Commission and national competition authorities and between the national competition authorities.

33. It may be argued that the objectives behind this network are equally valid with regard to application of Articles 53 and 54 of the EEA Agreement. Therefore, the EEA EFTA States have stressed the importance of the EEA EFTA competition authorities being part of the proposed network of competition authorities. The EEA EFTA States find that this is necessary in order to ensure that Articles 53 and 54 are applied throughout the whole EEA and in order to maintain the present level of cooperation between the EU and EFTA pillar.

Final considerations for the incorporation of the Reform into the EEA Agreement

34. The EEA EFTA States played an active role in the decision-shaping phase of the new competition policy. The reform is currently under consideration in the Council, to which the EEA EFTA States have no formal access. Once adopted by the Council, the outcome will be scrutinized by EEA EFTA experts with a view to incorporating the Reform into the EEA Agreement. It seems at this stage that the Reform could be integrated into the Agreement by amending Protocols 21 and 23, thus not requiring

amendments to the Main Part of the Agreement. It should, however, be underlined that the work in the Council is on-going and that the outcome must be looked at thoroughly before the incorporation into the EEA Agreement can take place.

RESOLUTION

On New competition policies in the EEA

The Joint Parliamentary Committee of the European Economic Area:

A. Recalling its earlier resolutions on competition policy, adopted 12 September 1996,

B. Underlining the importance of equal conditions of competition within the EEA for the good functioning of the EEA Agreement,

C. Emphasising the importance of the homogeneous application of competition rules in the EEA and recognizing the efforts of the European Commission and the EFTA Surveillance Authority in this regard,

1. Welcomes the Commission's proposal for a new Regulation implementing Articles 81 and 82 of the EC Treaty;

2. Underlines the importance of incorporating the reform into the EEA Agreement;

3. Calls upon the Contracting Parties to incorporate the reform in a manner that ensures a homogeneous EEA, in particular by amending Protocols 21 and 23 of the EEA Agreement but stresses that the work on the reform has not yet been finalized by the Council of the European Union;

4. Recognises the need to solve certain specific EEA related issues raised by the reform, particularly in relation to the decentralised application of the competition rules;

5. Calls upon the Contracting Parties to solve these issues in a manner that ensures equal conditions of competition throughout the EEA and a satisfactory level of co-operation between the EU and EFTA pillar in the enforcement of the EEA Agreement;

6. Calls upon the Contracting Parties to ensure decentralised application of Articles 53 and 54 of the EEA Agreement within in whole EEA and encourages all EEA Member States to empower their national competition authorities to apply Articles 53 and 54 EEA;

7. Recognises the need to ensure uniform application of Articles 53 and 54 EEA in a new decentralised enforcement system;

8. Notes that a network of competition authorities is going to be set up under the new Regulation and stresses the importance of EEA EFTA participation in the network in order to ensure uniform application of Articles 53 and 54 throughout the whole EEA, and in order to maintain the present level of cooperation between the EU and EFTA pillar.