INTERNATIONAL COMPETITION LAW SERIES

A PRACTICAL GUIDE TO NATIONAL COMPETITION RULES ACROSS EUROPE

Edited by
Marjorie Holmes
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KLUWER LAW
INTERNATIONAL

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Preface

We are living in exciting times in the European Union. As of 1 May 2004, its membership increases to 25 Member States with a population of about 452 million. This can only enhance its role on the World Stage.

The publication has taken two years to compile together and has been inspired by the changes within the European Union in the form of modernization or decentralization. From May 2004 the European Commission has given up its exclusive jurisdiction over competition issues that affect trade across Europe. In future it will share this role with the Member States.

The survey has been completed using practising competition lawyers in all of the Member States. In addition to covering each Member State, we have included chapters on Switzerland and Norway within the scope of the book because of their close proximity as well as their Membership of the European Economic Area (EEA). It is impossible to complete a survey of all countries on a single day. However all reports have been completed between 2003 and the beginning of 2004. We stress that the Comments and Recommendations Chapter sets out our own personal views only.

There are a number of people we must thank for their great assistance in relation to compiling this book. We thank all the contributors who have written the chapters covering their own jurisdiction. We also thank the lawyers and businessmen from the US, Japan, Israel, Australia and other non-European jurisdictions who have provided us with information and their views, allowing us to draw some comparisons on how competition issues are addressed around the world. In particular we would like to thank Shinichi Okabe of Tokio Marine & Fire Insurance Co Ltd (Tokyo, Japan); R. Reinish of Seyforth Shaw LLP (Chicago, USA); David Malkoff of S. Friedman & Co (Israel); Keith Fisher of Suffolk University in Boston (Massachusetts, USA), Hiba I. Husseini, Husseini & Husseini (West Bank, Palestine), Rana bin Tarif, Rana Bin Tarif Law Office (Amman, Jordan) and Susan Yeekong (Ebsworth and Ebsworth, Sydney, Australia).

A special thanks to Guy Cheeseman, PONL and Graham Hamilton, Andrew Weir Shipping who, back in the 1990s, gave us the support and opportunity to enter the fascinating field of competition. We thank colleagues at Davies Arnold Cooper – David McIntosh, Paula Lennon, Joanne Sandiford and Information Services (Gail Sanderson, Caroline Donovan and John Franssen). We also thank Morvan Le Berre Central European Law Offices, Brussels, Joerg Habicht, David Szafran, Dermot Whelan, Gary Davey, Leo Holmes and counsel in the *Arkin* case, Steven Gee QC and Hugh Mercer, for their comments and assistance in editing and information support.

Finally, we thank Emil Paulis at the European Commission for agreeing to do the Foreword.

1st March 2004
Marjorie Holmes and Lesley Davey

Foreword

On 1 May 2004 the European Union will undergo a historic transformation with its expansion to a membership of 25 states. Correspondingly, the enforcement of Community competition law across the Union will also undergo a radical transformation on that same day, when, *inter alia*, the new enforcement regime contained in Regulation 1/2003 will come into force.

Regulation 1 is based on the principle of the cooperation of the Commission and the antitrust authorities of the Member States in the enforcement of EC antitrust law. As such it marks an important step forwards from the previous system of enforcement focussed predominantly on the Commission. The enforcing authorities within the Member States are not limited only to the public enforcement authorities, but also include the courts of the Member States who are called upon, and indeed explicitly enabled by Regulation 1, to enforce Community competition law.

These developments mean that industry and the whole community of competition law practitioners and enforcers will need to be more familiar with competition law and its practice in all the Member States of the Community. Competition lawyers across the different jurisdictions will have to make direct judgments about the legality of market behaviour affecting more than one European jurisdiction, without the possibility of going to the Commission for a constitutive decision.

Private enforcement of competition law is common in the US, and it is a commonplace to compare this to the current relative lack of such enforcement in Europe. Increased private enforcement of the competition rules in Europe would render those rules more effective and provide individuals with appropriate rights in case of infringements, including the possibility of recovering any losses. Facilitation of private actions in Europe should encourage the more direct involvement of the citizen, particularly consumers, in the aims and promotion of Community competition law. To argue that private enforcement in Europe is too difficult because the legal conditions are not in place is pre-emptive. We do indeed live in a Community of diverse legal traditions and communities, but with the right legal framework, private enforcement of the Community competition rules might not seem as difficult as it can do today.

To these ends studies of this kind, bringing together lawyers from jurisdictions across the enlarged Community, are to be welcomed. The value of the present work is enhanced by the fact that most contributors are based in the jurisdiction they are writing about. Such studies are invaluable in the first place in terms of collating raw data on the law across the different Member States. This will help to educate the legal and business community on the implementation of Community competition law across the different jurisdictions, something which will be of increased assistance in the modernized world. Furthermore, this type of work encourages the development of a

cross-border legal community and, I hope, will help the European legal profession to develop common approaches and solutions to problems posed by a common body of substantive law and commercial practice. In this way works such as the present go some way towards representing the practice and implementation of a common law of competition for Europe and thus help to realize some of the ideas behind modernization.

Emil Paulis
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Introduction

Today it is commonly accepted that competition is a good thing for a market economy based on supply and demand. As supply tries to meet demand, so competition encourages attractive prices and improved quality through innovation and increased economic efficiency. This in turn benefits the customer and consumer, resulting in economic freedom for all.

It is therefore not surprising that competition policy globally has developed as an important component of the environment in which businesses have to operate today. Companies who ignore the impact of competition policy on their activities do so at their peril. In recent years we have seen countries throughout the world tightening and strengthening their competition regimes. Through fora such as the Organization for Economic Co-operation and Development, those countries, which had undeveloped or even no competition rules, have been able to benefit from the experience of countries with well-developed competition regimes. Whilst Jordan is the only country in the Arab-Middle Eastern and Arab Gulf region to have implemented a competition policy, even new emerging states such as Palestine are developing competition regimes.[1] Along with countries such as the United States and Canada, both of whom have competition regimes dating back to the nineteenth century, the European Union (EU) has played a role in encouraging the development of these new regimes.

The EU itself has realized that within this new environment it has to have a modern competition regime. Much has changed since the competition provisions of the Treaty of Rome were drafted. In the 1950s competition concerns seemed to concentrate on ensuring that there was no price discrimination or refusal to supply based on nationality.[2] Protecting national interests seemed to be the underlying purpose for developing a competition policy. Today protecting the interests of the customer and consumer is the ultimate aim of any modern competition regime. Whilst the wording of the Treaty provisions may not have changed, their objectives have changed to such an extent that enforcement of these provisions has to be effective.

1 May 2004 is an important day for the EU. It will increase in size to 25 Member States as a result of the biggest expansion in its history. On the same day, the EU competition regime will undergo its first major amendment in over forty years. The fact that these two events take place on the same day is no coincidence.

1. Information received from Ms Hiba I. Husseini, Husseini & Husseini, West Bank, Palestine and Ms Rana Bin Tarif, Rana Bin Tarif Law Office, Amman, Jordan.
2. See Ian Forrester Q.C., 'The Modernisation of EC Antitrust Policy: Compatibility, Efficiency, Legal Security' – European Competition Law Annual: 2000 The Modernisation of EC Antitrust, edited by Claus Dieter Ehlermann and Isabela Atanasiu.

Since its adoption in 1962, Council Regulation 17/62[3] has been the engine driving EU competition policy forward. It provided the mechanism that allowed companies to notify agreements, which prima facie breached EU competition rules, to the European Commission for exemption. It therefore provided the means by which companies could ensure their activities were compliant with Articles 81 and 82 of the EC Treaty. However the procedures contained in the Regulation relating to notification and the granting of individual exemptions, were designed for a community with only six Member States. On 1 May 2004 this number quadruples.

Consequently if the status quo was maintained then the responsibility for enforcing Europe's competition rules across 25 jurisdictions would lie primarily in the hands of the 344 administrators employed in the Commission's Directorate General for Competition.[4] To say resources would be stretched would be an understatement. A new system therefore had to be put in place.

As a result on 1 May 2004, Council Regulation (EC) No 1/2003 comes into force in all Member States. The new Regulation:

- abolishes the system of notifying agreements to the European Commission;
- gives the European Commission greater powers of investigation;
- gives powers to the Member States to enforce Articles 81 and 82 of the EC Treaty; and
- provides for greater cooperation and exchange of information between the European Commission, the national competition authorities and the national courts.

With the abolition of notifications at a European level, undertakings and their advisors must therefore decide themselves whether their agreements fulfil the conditions contained in Article 81(3) of the EC Treaty to benefit from an exemption from the prohibitions contained in Article 81(1) of the EC Treaty. It is recognized that in certain circumstances this situation will lead to a certain amount of legal uncertainty. The preamble to the Regulation however states that *'where cases give rise to genuine uncertainty because they present novel or unresolved questions for the application of these rules, individual undertakings may wish to seek informal guidance from the Commission'*. Informal approaches to the Commission are still an option for undertakings wishing to seek clarification about compliance with European competition rules.

Regulation 1/2003 therefore creates a system of self-assessment for companies who wish to ensure their activities are compatible with Europe's competition rules. In such a self-regulatory environment companies might think that they will be able to get away with illegal anti-competitive activities. This is unlikely to happen with the Commission outsourcing the burden of enforcing the EU competition rules down to the Member States. Consequently both the Commission and national competition authorities will be investigating alleged anti-competitive behaviour.

Far from being able to ignore competition rules in Europe, companies therefore now have to be aware of the activities of not only the Commission but also national competition authorities in enforcing Europe's competition rules. Public enforcement of competition rules is therefore strengthened in this new environment.

3. EEC Council Regulation No 17, First Regulation implementing Articles 85 and 86 of the Treaty *Official Journal p013, 21/02/1962.*
4. Figure for A grade administrators in DG Comp 2002-see http://www.europa.eu.int/ comm/dgs/competition/directory/staff.pdf

In addition private enforcement of competition rules may also have a role to play in this new modernized environment. Those who believe they have fallen victim to the activities of a cartel or dominant undertaking may be encouraged to take private actions before national courts seeking damages for any loss suffered as a result of anti-competitive behaviour.

Companies and their legal advisers therefore have to be aware of the application of competition rules not only at a European level but also at a national competition level. They also need to know how national competition authorities and courts apply competition rules. If private enforcement of competition rules increases, companies and their legal advisers need to understand how national civil procedure rules apply to competition cases. For those who believe they have suffered as a result of anti-competitive activity, it is also important to understand how they can claim damages in different jurisdictions. They therefore have to be aware of the pros and cons of choosing one national regime over another.

This Guide therefore aims to give practical guidance on the two fundamental tools that competition practitioners will need when advising clients in the future:

- the current competition regimes of each EU Member State
- the civil procedures affecting enforcement of competition damage claims in each EU Member State.

What this Guide covers

This Guide looks at each competition regime from a practical perspective. It includes country chapters covering the original fifteen EU Member States as well as Norway and Switzerland. In addition there is a chapter, which explains in general terms the competition regimes of the new EU Member States. It is intended that future editions of this Guide will include individual chapters looking at these countries' competition regimes in detail.

Each country chapter looks at the competition rules and procedures that exist in each Member State. Where applicable, there is an overview of the civil procedure rules that are in place in a Member State and an analysis of how such rules will be applicable to any potential damage claims arising from breaches of the competition rules.

The country chapters include:

- an introduction to the relevant competition authorities;
- an explanation of the substantive laws dealing with restrictive agreements and abuses of the dominant position;
- practical application of these substantive laws, looking at issues such as notifications, exemptions, penalties for breaches of the competition rules and the operation of leniency programmes;
- an explanation of the substantive laws dealing with merger control;
- practical application of the merger control laws;
- civil procedure rules dealing with the standing required to bring competition cases before the national courts, funding of competition cases, limitation, legal privilege, burden and standard of proof, disclosure issues including the question of legal privilege and the remedies available before national courts;
- an overview of the applicability of competition rules to specific industry sectors; and
- applicable case law, which shows the level of damages and other remedies that the national competition authorities and courts have awarded in competition cases.

This book does not aim to be a definitive analysis of each of the competition regimes in the Member States. Rather it aims to be a practical comparative handbook, which guides practitioners through each national competition regime.

In compiling this Guide, we have noted that there are a number of similarities and differences in the application of competition rules and civil procedures between the EU Member States, taking into account common law and roman law jurisdictions. We have consequently reached a number of conclusions on the future of public and private enforcement of competition rules across Europe. These findings are set out in Chapter 1.

At the end of the Guide in Appendices 1 and 2 there are two tables summarising these similarities and differences. Appendix 3 lists the contact details of all competition authorities across Europe.

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