The European Union’s New Competition Approach and Arbitration

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Introduction

Economic globalization has fuelled explosive growth within international trade and consequently in matters of competition and application of competition law. The Commission, the national courts (NCs), and the administrative authorities (NAs) all have jurisdiction to apply Article 81(1) of the EC Treaty. However, national courts are not entirely agreed as to the appropriate standard of proof for Article 81 and 82 infringement proceedings as an infringement of Article 81 or 82 must be made out by strong and credible evidence. Competition authorities have to act in the public interest, not in the private interest of individual market actors. Besides, practice shows that there is a tendency to favour national undertakings. The problem is who is to maintain consistency in competition policy throughout the EU and to that extent the European Commission has to play this role. Additionally, neutral arbitrators can retain consistency in competition policy.

Enforcing EU Competition Law

Articles 81 and 82 of the European Economic Community (EEC) Treaty (formerly Article 85 and 86 of the EC Treaty) limit the ability of members of the European Union to restrict, prevent or distort trade. However, Article 81.3 allows for exemptions from the purview of Article 81.1 in certain circumstances. Article 81.3 does not describe the procedure for obtaining an exemption. It also leaves room for discretionary decision-making about exemption determinations and does not restrict the authorities that could make such determinations.

Article 234 (formerly Article 177) of the treaty establishing the EEC Treaty gives the European Court of Justice (ECJ) jurisdiction to give “preliminary rulings” concerning interpretation of the Treaty. It also permits national courts and tribunals that are dealing with such an issue to “request a ruling” from the ECJ if it necessary to issue a judgment

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Article 225 (formerly Article 168a) of the EEC treaty gives jurisdiction to the Court of First Instance (CFI), which is attached to the ECJ, to hear and determine (subject to appeal to the ECJ) “points of law” and certain classes of action or proceedings. It would seem that determining whether an agreement meets the criteria for an exemption under Article 81.3 is precisely the type of case that the CFI was intended to decide.

**Effect of Regulations**

Council Regulation No 17 (EEC)\(^2\) established the European Commission’s exclusive monopoly to authorize exemptions under Article 81.3. This Regulation also required companies entering into agreements prohibited by Article 81.1 to give prior notice to the Commission. In BRT v. SABOR, the ECJ recognized that article 81.3 was directly effective.\(^3\)

The centralized system requiring prior notification to and formal authorization by the European Commission led to a great number of requests for an exemption under Article 81.3. To alleviate the resulting administrative paralysis (i.e., reduce the Commission’s workload), in June 1999, the Commission adopted Regulation No. 1215/99, which exempted certain categories or blocs of agreements under Article 81.3. These included agreements placing vertical restraints on competition and those placing restrictions on the acquisition of industrial property rights (such as patents, designs or trade marks).\(^4\) Later the same year, the Commission adopted Regulation No. 2790/99, which contained a new block exemption for all forms of vertical restraints for products and services.\(^5\) These exemptions replaced the bloc exemptions for exclusive distribution, exclusive purchasing and franchising agreements in EEC Regulations No. 1983/83\(^6\), 1984/83\(^7\) and 4087/88\(^8\).

Also in 1999, the European Commission published a White Paper discussing the modernization of the rules implementing Article 81.9 The axis of this reform effort was to further lighten the Commission’s workload by abolishing its exclusive responsibility for granting Article 81.3 exemptions. The goal was to expand the jurisdiction for making

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2 Official Journal No. 013, 21.02.1962
3 Case 1278/73 BRT v SABAM [1974] ECR 51
9 Official Journal of the European Union 1999 C 132/1. The EEC was originally formed in 1958 by Belgium, France, Italy, Luxembourg, the Netherlands, and what was once West Germany. It joined with members of the European Free Trade Association to form the European Union (EU). The European Commission is the guardian of the EEC Treaties. It is composed of 20 independent members (two each from France, Germany, Italy, Spain and the United Kingdom and one each from all the other countries). Commission White Papers contain proposals for certain action.
these determinations to national courts and competition authorities. EU courts (e.g., the CFI) already had jurisdiction to make these determinations.

The White Paper aimed at decentralizing the system of enforcing EU competition law. The change it proposed is the subject of Regulation No. 1/2003 of Dec. 16, 2002\(^{10}\), which took effect May 2004.

**Consequences of Regulation No. 1/2003**

Decentralizing the application of Article 81.3 can be expected to have a profound effect. Under the prior scheme, the prohibition in Article 81.1 was automatically applicable to all agreements described therein, even if they appeared to meet the criteria for an exemption under Article 81.3. To obtain an exemption, the company had to give the European Commission notice of the agreement and the Commission had to issue a formal determination authorizing an exemption. Under the new regulation, Article 81.1 has become automatically *inapplicable* to agreements that meet the qualifications for an exemption under Article 81.3. No longer is there a need for prior notification to the Commission or for the Commission to formally authorize individual agreements as exempt. Challenges to the entitlement to an Article 81.3 exemption for particular agreements are raised by parties in national courts and competition authorities of Member States (or if they choose, EU courts).

While the modernization effort may achieve the desired result as far as the Commission’s work is concerned, it is likely to lead to a significant increase in the caseload of national courts and competition authorities. Regulation 1/2003, by decentralizing responsibility for issues relating to Article 81.3 can be expected to reduce the number of Article 81.3 cases heard by the CFI, which are precisely the type of cases that the CFI was intended to decide.

More significantly, decentralization is likely to lead to less coherent enforcement of Article 81.3. Clearly, the new Regulation creates significant interpretive opportunities for national court judges to make varying Article 81.3 determinations. While Article 234 authorizes national courts to seek a preliminary ruling from the ECJ on treaty issues, it does not require them to see such review. In addition, it will take some time to obtain a body of law on these questions. While a case wends its way through a national court system, many years may pass before it reaches the highest court of appeal. Clearly, this process could lead to different conclusions by different courts on the same or similar set of facts.

It is possible that the European Commission would retain the vast number of cases because national courts would lack jurisdiction to act beyond their own territory.\(^{11}\)

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\(^{10}\) Official Journal L 1, 4.1.2003

\(^{11}\) The Commission also notes that this option would hinder effective development of Community law in the national courts recognizing that national courts are required to cease to act if there is any chance that the underlying agreement or practice might be exempted under Article 81(3).

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Nonetheless, there could be a considerable amount of forum shopping among national courts to enhance the possibility of obtaining a particular result. It could be that forum shopping will not become a big problem because of Regulation (EC) No. 44/2001 of Dec. 22, 2000, which deals with jurisdiction, recognition and enforcement of judgments in civil commercial matters. This regulation recognizes the need for predictable rules on jurisdiction (generally based on the defendant's domicile, with some exceptions) and the importance of minimizing concurrent proceedings and conflicting judgments. However, this Regulation may not be enough to prevent their occurrence, especially on matters of electronic transactions by cyberspace.

Viability of ECJ Reference Procedure

The ability of national courts to request a preliminary ruling from the ECJ on matters of treaty issues could help avoid the problem of inconsistent judgments. Were national courts to take advantage of this, we could expect a coherent interpretation of Article 81.3 throughout the EU Community. However, seeking an ECJ preliminary ruling is a slow procedure. According to the ECJ, the average duration of such a proceeding exceeded 21 months (for the year 1998). Thus, reliance on a preliminary ruling to secure consistent interpretation and application of Article 81 by national courts may be impractical.

Critique of Decentralizing Article 81.3 Determinations

The ECJ implicitly decided against Article 81.3 having immediate effect over 40 years ago in Geus v Bosch. Moreover, the language of Article 81.3 supports that view. Article 81.3 requires a complex weighing and balancing of opposing interests. Moreover, the weighing process is not limited to consideration of strictly economic competition-oriented concerns; non-economic values also may be taken into account. Significantly, Article 81.3 contains elements of administrative discretion that are incompatible with the exemption applying automatically, without formal authorization by an EU body, national court or authority.

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12 Official Journal L 012, 16/01/2001 P. 0001–0023
13 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters repeals the Brussels Convention. In accordance with Article 1, this Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. An agreement of the parties conferring jurisdiction shall be either in writing or evidenced in writing or any communication by electronic means, which provides a durable record of the agreement shall be equivalent to, writing. OJ 2001 L12/11
15 Case 13/61 Geus v Bosch [1962] ECR 45, decided before Regulation 17. In this case, the Court, interpreting Article 84 (former Article 88), determined that a decision by the authorities of a Member State on the admissibility of agreements was envisaged only after the agreements were submitted for approval under the relevant competition law.
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If state courts are entrusted with the task of applying Article 81.3, the legal effect of their decisions will be limited to the territory of the state in which they are located. Moreover, subjective or local elements are likely to affect their decisions, as they take into account the commercial policy of other Member States. This is likely to lead to decisions based on different criteria, with differing results. The same could be said of national authorities.

Achieving consistency in the application of EU law could be obtained if national courts of Member States were to recognize and enforce each other’s judicial decisions dealing with EU law and if national authorities were to act as an agency of the EU and apply its substantive and procedural rules when enforcing EU competition law. But that is not currently likely to happen. The EU is not a federal system in which a European federal court’s decision could be enforced throughout the EU. Nor are national authorities agents of the EU. Besides, the endorsement of a European Constitution could lead to the creation of a federal system in EU.

It is true that different individuals interpret and apply legal rules differently. Even the ECJ cannot guarantee a completely consistent and coherent application of the law in individual cases.

Notwithstanding Regulation No. 1/2003, we can expect the European Commission to play a central role in determining EU competition policy, which should have an ameliorating effect on national court and authority decisions interpreting the EEC treaty. The retention of the commission’s exemption monopoly therefore constitutes a serious limit to the ability of national competition authorities actively to pursue even apparently well-founded complaints. Two Commission notices, one in 1993 and the other in 1997, established mechanisms for cooperation and information sharing among national courts, national authorities and commissions in applying competition law and policy. Yet they are not likely to eliminate the risk of divergent decisions under a system in which Article 81.3 exemptions have immediate effect until challenged in these venues.

In my view, a system of ex post facto regulation is inferior (from a legal certainty point of view) to a prior notification and formal authorization regime. That is not to say that ex post facto control of exemptions could not have a deterrent effect. But the price will be a larger caseload for national courts and authorities, which could create more problems than Commission’s monopoly on Article 81.3 decision making.

The Role of Arbitration

Has arbitration a role to play in implementing the modernization of EU competition policy, particularly disputes involving Article 81.3? It should, but at the present time it does not.

Arbitration is a voluntary process, created by the contract of the parties. It has many advantages for the parties to an international commercial dispute. The procedures are well-accepted and the process can be more efficient than those of national courts. Moreover there is an effective mechanism for the enforcement of international awards—the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
Awards: This Convention ensures that a national court in one Member State will recognize and enforce an arbitral award issued in another Member State (unless a Convention exception applies).

Increasingly, nations compete with each other for selection as the forum for international arbitration. Technology disputes typically centre on contract or intellectual property law issues. Arbitration is "a process of dispute resolution in which a neutral third party (the arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard. Where arbitration is voluntary, the disputing parties select the arbitrator who has the power to render a binding decision."17 The arbitration process is less formal than a court proceeding. Contracts often require binding arbitration to settle disputes between parties and so arbitration is a "creature of contract" by which private parties consent to a neutral third party to resolve their disputes.18 It is a private tribunal created by and consented to by private individuals for the purpose of resolving specific private disputes. Arbitration is beneficial because it is less expensive and faster than traditional litigation. Some parties choose arbitration when they want a more knowledgeable person to render a decision. For example, a chemical manufacturing company might request a patent attorney with a chemical engineering background to arbitrate a dispute about product quality and purity with a buyer. Arbitration is also beneficial to many parties because unlike a case litigated in open court, records from arbitration do not become part of the public record. Perhaps the greatest advantage of international arbitration is that the interplay of existing international treaties and national laws allow for international arbitration awards to be enforceable nearly worldwide. The most widely adopted treaty, the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention, has been adopted throughout most of Europe, the Americas and Asia.

Unfortunately, EU law does not give arbitrators jurisdiction to determine treaty issues. Article 234 does not give exclusive jurisdiction of treaty interpretation issues to the ECJ. However, it makes no mention of arbitrators at all. As noted above, Regulation 17 reserves the sole power to decide Article 81.3 issues to the European Commission. Furthermore, new Regulation 1/2003 contemplates only that national courts and competition authorities, not arbitral tribunals, will have the power to apply this provision of the EEC Treaty.

It is suggested that the approach taken in Regulation 1/2003 is short-sighted. Should arbitrators avoid hearing any dispute involving a violation of EU policy, particularly issues involving Article 81.3? Arbitrators are skilled in applying Articles 81 and 82 in a great number of awards and they are just as capable of applying Article 81.3. An arbitral award regardless that enjoy res judicata as between the parties, it would be exposed to an

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annulment action before the competent national court. The parties could not enforce an award that contradicts a Commission’s decision because otherwise risk been fined by the Commission. There are no measures meant to guarantee the coherence of the application of EC competition law by arbitrators. The arbitrariness of competition matters cannot be challenged. Arbitrators should over apply EC competition law in order to avoid any infringement of antitrust provisions. So, arbitrators would avoid any violation of public policy, which means annulment of their awards. The judicial review of the NCAs decisions by the national courts will only receive judicial examination at community level by the ECJ under article 234. It could be argued that a refusal to co-operate with arbitrators would not be in conformity with the Commission’s central role in the enforcement of the competition law regime of the Treaty.¹⁹

There is nothing in Regulation 1/2003 that would provide a legal basis for formal cooperation between the Commission and arbitrators in the sense of the former being bound to assist the latter on a specific competition-related issue. The probable reason is that the European Commission’s duty is to assist national courts in Member States. This duty emanates from Article 10 of the EC Treaty. Since arbitral tribunals are not judicial organs to which Article 10 applies, they could not send treaty issues for preliminary rulings to the ECJ. Ever since the ruling by the ECJ in Nordee²⁰ that court cannot accept requests for preliminary rulings from arbitrators. The ECJ confirms this principle in the Eco Swiss²¹ case as well. Thus, there is an unequal treatment of arbitration versus

¹⁹ Article 85 “The commission shall ensure the application of the principles laid down in article 81 and 82”.
²⁰ Case 102/81 Nordee Deutsche v Rederei Mond [1982] ECR 1095 (the ECJ denied to accept the legality of the tribunal on two grounds: first the arbitration was not mandatory as the parties left free to have their dispute settled either by a court of law or by arbitration and second the public authorities were in no way, either directly or indirectly, involved in or associated with the arbitration proceedings.) In order to determine whether a body making a reference is a court or tribunal for the purposes of Article 234 EC, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent. Joined Cases C-110/98 to C-147/98 Gaballfrisa and Others [2000] ECR I-1577, paragraph 33. Case C-54/96 Dorsch Consult [1997] ECR I-4961, paragraph 23. Advocate-General in François De Coster v College des bourgmestre et chevins de Watermael-Boitsfort (Case C-17/00.European Court reports 2001 Page I-09445) specified that it is for the ordinary courts to refer a question for a preliminary ruling, if they consider it necessary, either in the context of their collaboration with the arbitration tribunals or in the course of reviewing the arbitration award and after the Nordee judgment, reference to the arbitration tribunal were compulsory and at last instance, a reply would be given to the question. That happened in the Danfoss case, in which the reference for a preliminary ruling was made by a Danish arbitration court granted final jurisdiction by law in disputes relating to collective agreements between employees’ organisations and employers, where the jurisdiction did not depend on the agreement between the parties since either might bring a case before it despite the objections of the other, and the decision was binding on everybody.
²¹ http://europa.eu.int/jurisp/cgi-bin/form.pl?lang=en (legal texts-case law) Paragraph 48 “Community law does not require a national court to refrain from applying domestic rules of procedure according to which an interim arbitration award which is in the nature of a final award and in respect of which no application for annulment has been made within the prescribed time-limit acquires the force of res judicata and may no longer be called in question by a subsequent arbitration award, even if this is necessary in order to examine, in proceedings for annulment of a subsequent arbitration award, whether an agreement which the interim
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litigation. In other words, the ECJ does not regard the consensual arbitration as an alternative and independent method of dispute resolution regardless that consensual arbitration has been accepted as a method of resolution for disputes arising from contracts involving the European Union itself.

**Recommendations**

Although the primary attraction of arbitration is to avoid delays, expenses and vexation of ordinary litigation\(^{22}\), the view of the ECJ expressed in *Eco Swiss* case does not help to this direction. It is worth mentioning that there is criticism that arbitration is too much like litigation. Moreover, the EU should follow the lead taken by other nations and organizations in using ADR for IP competition disputes, despite its past reluctance to use arbitration. This would prevent the fragmentation of the common market and, ultimately, the curtailment of European competitiveness. Where modern developments exceed the speed with which the law can respond to them, ADR should be considered a preferred alternative. Moreover, Directive 2000/31/EC\(^{23}\) indicates that the courts can resolve disputes about electronic transactions\(^{24}\). Taking into account that courts are involved in all stages of arbitration concerning traditional commercial disputes then in electronic arbitration courts will come to deal with disputes about matters of the arbitral process as well. Besides, the author supports the creation of second degree of arbitral tribunals and e-arbitral tribunals to deal not only with review of awards but also with any dispute regarding the arbitral process rather than the national courts\(^{25}\). Finally, the EU should consider and treat arbitral tribunals and e-arbitral tribunals equal to national courts regarding the application of EU law.

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award held to be valid in law is nevertheless void under Article 81 EC (ex Article 81)”. G Zekos “Eco Swiss v Benetton: Court’s Intervention in arbitration” 2000 Journal of International Arbitration 91, No2.

\(^{22}\) McKenna v Shearson Lehman Hutton Inc 592 A2d 980.


\(^{24}\) Article 18 Court actions 1. Member States shall ensure that court actions available under national law concerning information society services' activities allow for the rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved.


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