VIEWPOINT:

DEVELOPMENT OF EC COMPETITION OVER ITS FIRST 50 YEARS – INTERVENTION REDUCED

Valentine Korah

An eCCP Publication

April 2007

© 2007 Valentine Korah. Published with permission by eCCP.

Development of EC Competition Over Its First 50 years – Intervention Reduced

By

Valentine Korah*

Article 81 forbids as incompatible with the common market collusion that may affect trade between member states and has the object or effect of restricting competition. Such agreements are automatically void, but may be exempted under Article 81(3). Article 82 forbids, also as incompatible with the common market, the abuse of a dominant position.[1]

The first decisions of the European Commission on competition were adopted in 1964. The six member states were all in Continental Europe where legislation was considered the proper method of changing the law and lawyers were expected to follow its letter. Judges were not expected to mention policy. Articles 81 and 82 were applied formalistically by young officials in the Commission, few of whom had had any experience of practice, or invested in anything more important than a house in Tevuren. Many tended to consider that an agreement would be less anti-competitive if limitations on conduct were removed.

The Court of Justice of the European Communities (ECJ) clearly stated in *Société La Technique Minière v Maschinenbau Ulm GmbH*[2] that "the competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute:" the counterfactual was "in the absence of the agreement." This statement, however, was ignored after the judgment of the ECJ three weeks later in *Etablissements Consten SA and Grundig-Verkaufs-GmbH v EEC Commission.*[3] Most

* Valentine Korah is Emeritus Professor of Competition Law at University College London. Prof. Korah is also an eminent competition, EC and antitrust lawyer. She was a Visiting Professor, Fordham Law School 1991-2004; she is an Honorary Professor at College of Europe in Bruges and was the visiting Professor responsible for dominant course on EEC Competition Law at the College; formerly, visiting Professor at the Universities of Lund and Valencia teaching parts of an LL.M course on EC Competition Law; and a speaker and consultant for conferences on competition law.

[1] "Article 81" and "Article 82" will hereinafter refer to Articles 81 and 82 respectively of the EC Treaty .

[2] (56/65), [1966] ECR 235.

[3] (56 & 58/64), [1966] ECR 299. The Court consisted of the same 5 judges as in *Technique Minièrè* with only two additional judges.

ancillary restraints were exempted, not cleared. Only in this millenium, as a result of consultation on the technology transfer regulation and more generally in the context of the new implementing regulation,[4] has the counterfactual been perceived as what would have occurred without the agreement. This has been a most important development.

In 1964, the Commission started to adopt decisions on distribution agreements and found that an exclusive territory supported by export bans had the object or effect of restricting competition.[5] By treating the counterfactual as the agreement without the restrictive provisions even if the agreement could not have been concluded without protection from free riders, the Commission perceived many vertical agreements as horizontal. As only it had power to grant an individual exemption, this gave it power to interfere with many agreements, often after bargaining power had changed.

When the Commission came to consider price fixing cartels with national quotas from 1959, it treated them with greater hostility. Increasingly heavy fines were imposed, but it had difficulty in establishing the extent of cartels, so the fines were often reduced by the Court. It was only in 1996 that the Commission adopted its first leniency notice[6] and it is short of resources for preparing a formal decision establishing the infringement that will stand up on appeal to the Court of First Instance.

By the 1980s, some economics was beginning to be taught in postgraduate competition courses for lawyers. Officials came and went and by the 1980s some favoured vertical agreements and joint ventures where the parties had complementary assets and skills but, for the greater part, these were drafted as exemptions from the prohibition of Article 81(1) under Article 81(3) and few agreements were cleared as being outside the prohibition. Conditions were imposed on the exemption.

Article 82 was applied to firms with a large share of narrowly defined markets without paying great attention to the actual or probable effects of conduct. Many officials were more concerned to protect competitors on the ground that if there were more

---

[4] Guideline 11 on technology transfer agreements, OJ 2004, C101/2 and Guideline 18(1) on Article 81(3) of the Treaty, OJ 2004, C101/97.

[5] Although it adopted a *de minimis* limitation to this, in *Grosfillex*, JO 915/64, [1964] CMLR 237. When the double import duties that would have been payable on buying a French book in Switzerland and exporting it back to France would preclude the products coming back to Europe even without an export ban.

[6] Now replaced by a further notice, OJ 2006, C 298/17.

competitors, there would be more competition. They focused on a competitive structure of the market more than on whether firms were competing for the market or in it.

By the 1990s, many officials, not only the younger ones who had learned some economics at University, began to think the Commission was too interventionist. The Commission lacked the resources to appraise so many agreements. There was a long period of internal debate, and the Commission started to reform the law on vertical agreements, perceived as being easier to deal with than dominant firms or horizontal agreements. It adopted Regulation 2790/1999[7] granting a group exemption for many distribution agreements and guidelines[8] that not only interpreted the regulation, but also explained the ways in which vertical restraints might harm competition or increase it. The guidelines cleared many restrictions on conduct needed to protect those making investments from free riders.

The major advance was Regulation 1/2003,[9] the new implementing regulation. By repealing regulation 17/62, it abrogated the notification system. It ensured that Article 81(3) had direct effect, and thereby reduced the importance of the bifurcation of Article 81(1) and (3), although the burden of proof under Article 81(3) is on the person alleging legality.

More legislation came into force on May 1, 2004, the group exemption for technology transfer, and the new merger regulation, both with important guidelines that recognized the possibility of efficiencies saving a transaction. The application of Article 81 and the merger regulation were modernized.

The old views on Article 82 are still accepted by the courts, although the views are now controversial. The Commission is trying focus on avoiding consumer harm, and analyzing the direct or indirect effects on consumers of conduct alleged to be abusive. There is a huge dispute between those influenced by the German school of Ordo Liberals, interested in competition as an institution and the protection of competitors, on the one hand, and those influenced by developments in the USA and concern for

[7] OJ 1999, L336/21, [2000] 4 CMLR 398.
[8] OJ 2000, C291/1.
[9] OJ 2003, L1/1, [2003] 4 CMLR 551.

efficiency. We await draft guidelines to be published for comment in about June of this year.

We still criticize the application of the EC competition rules, especially of Article 82, but practice has come a long way since 1958. At first, the Commission intervened whenever it could, now it does so more sparingly under Article 81(1), and has delegated much of its power to competition authorities in member states, whom it consults.

© 2007 Valentine Korah. Published with permission by eCCP.