

“The Commission’s Proposals for Modernisation of EC Competition Law: The Relationship between Articles 81 and 82 EC and National Competition Laws”

A commentary by
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1. Introduction

1.1. Article 3 of the EC Commission’s proposed Regulation implementing Articles 81 and 82 EC is in the following terms: -

Relationship between Articles 81 and 82 and national competition laws

Where an agreement, a decision by an association of undertakings or a concerted practice within the meaning of Article 81 of the Treaty or the abuse of a dominant position within the meaning of Article 82 may affect trade between Member States, Community competition law shall apply to the exclusion of national competition laws.

1.2. I want today to consider first how, if at all, this provision would affect the treatment under UK national law of anti-competitive conduct that has an actual or potential effect on trade between Member States but does not, or does not necessarily, constitute an infringement of Article 81 or Article 82 EC.

1.3. By way of preliminary comment, it seems likely that there is an asymmetry between the way in which Article 3 will affect the relationship between Article 81 EC and national law on the one hand, and the relationship between Article 82 EC and national law, on the other hand.

1.4. So far as *consensual* conduct is concerned, where the required actual or potential effect on trade between Member States is present, Article 81 EC will apply to the exclusion of the application of national “competition law” to *any* “agreement [between undertakings]”, construing the expression “agreement” broadly in accordance with the relevant

Community law. By contrast, so far as *unilateral* conduct is concerned, where the required actual or potential effect on trade between Member States is present, Article 82 EC will apply to the exclusion of the application of national "competition law" to unilateral conduct of an undertaking *only if* the conduct constitutes an "abuse of a dominant position", construing that expression in accordance with the relevant Community law.

- 1.5. With that prefatory comment, we can now consider to what extent, if at all, Article 3 of the proposal Regulation would affect the power of the UK authorities to apply the provisions of Part IV of the Fair Trading Act 1973 (Functions of the Director General of Fair Trading and the Competition Commission in relation to monopoly situations and uncompetitive practices).

2. Monopoly references to CC : General

- 2.1. Assume that, after the Regulation comes into force, the DGFT (or the Secretary of State) refers to the Competition Commission the supply of goods or services of a particular description in the United Kingdom.
- 2.2. The reference might in theory be "limited to the facts" (FTA, s.48). It is difficult to see why the resulting investigation should have to be halted if the CC concluded that:-
- an undertaking supplied at last a quarter of the goods or services of the description in question in the United Kingdom (hence the existing of a "scale monopoly" for the purposes of Part IV of the FTA);
 - that the undertaking was taking identified steps (by way of uncompetitive practices or otherwise) for the purpose of exploiting or maintaining the resulting "monopoly situation"; and
 - that identified actions or omission on the part of that undertaking was attributable to the existence of the "monopoly situation."
- 2.3. The resulting report on the facts would leave open the question whether the "monopoly situation" constituted a "dominant position" within the meaning of Article 82 EC and if so whether the "steps", "actions" and/or "omissions" constituted "abuses" of that dominant situation or, for that matter, anti-competitive agreements. But after Article 3 of the proposed Regulation had come into effect would such an exercise contravene it, if in fact the monopoly situation did constitute a dominant position in a substantial part of the Community within the meaning of Article 82 EC and the identified conduct did constitute abuse of that dominant position? It is *arguable* that one would then be "applying national competition law" to a situation in which Article 82 exclusively should be applied.
- 2.4. On balance I would reject that argument on the basis that the making of the reference to the CC and the resulting investigation were essentially procedural and the proposed Regulation does not affect the procedures that the Member States may use in competition cases.¹ On the contrary, one can even envisage using the reporting side of the Competition Commission in a rôle analogous to that of a U.S. grand jury by making to it a limited reference of that kind with a view to its producing a report on the basis of which the DGFT could decide whether or not to launch proceedings, whether under Article 81 or Article 82 EC or under Chapter I or Chapter II of the Competition Act 1998.

¹ Cf. Article 21(1) of the proposed Regulation which provides that:- "The competition authority of a Member State may in its own territory carry out any fact-finding measure under its national law on behalf and for the account of the competition authority of another Member State in order to establish whether there has been an infringement of Article 81 or Article 82 of the Treaty ..."

- 2.5. But what of monopoly references not "limited to the facts"? A "scale monopolist" may not enjoy a "dominant position" either because the description of goods or services to which the reference relates does not constitute a "relevant market" or because the market share of the "monopolist", while giving it some economic power, does not give it a dominant position.
- 2.6. Thus, in particular, market shares of less than 40 per cent have generally been regarded as insufficient to give rise to dominance.
- 2.7. If the market share of the "monopolist" does *not* give it a dominant position, Article 3 of the Regulation would not seem to affect the power of the CC to report that the "monopoly" (or, more likely, that steps taken by the "monopolist" for the purpose of exploiting or maintaining its situation or as attributable to the existence of the situation) operate or may be expected to operate against the public interest.
- 2.8. But would Article 3 of the proposed Regulation require the DGFT before making the reference, and the CC if the reference were made, to consider whether -
 - the monopoly situation constituted a dominant position within the meaning of Article 82 EC?
 - if so, whether "steps" taken by the "monopolist" constituted an abuse of that dominant position within the meaning of Article 82 EC?
 - if so whether the abuse had an actual or potential effect on trade with other Member States (generally to be presumed if the dominant position existed within, and the abuse affected, the whole of the United Kingdom)?
- 2.9. If those conditions were fulfilled, could the DGFT make the reference and, if he did so, could the CC report at all? If so, could it recommend anything other than that the DGFT should exercise his (yet to be conferred) powers under Article 82 EC? and, if it did so recommend could any of the other powers - i.e. those available under the FTA 1973 - validly be exercised?
- 2.10. Clearly there are fewer technical problems where the scale monopolist does *not* enjoy a dominant position within the meaning of Article 82 EC than where it does enjoy such a position. Yet, there would be something at least faintly anomalous about a suggestion that, whereas a Member State should be circumscribed by Community law with regard to what it can do about the conduct of undertakings that enjoy a dominant position if that conduct may affect trade between Member States, it is completely free with regard to what it can do about the unilateral conduct of undertakings with a *lesser* degree of economic power than that required to give rise to dominance even if that conduct may affect trade between Member States.
- 2.11. That problem is avoided if, as is suggested at paragraphs 1.3 - 1.4 above and as is thought to be the current view of the EC Commission, Article 3 leaves Member States free to include in their competition laws a *stricter* régime in respect of unilateral conduct (engaged in by any undertaking, dominant or not) than the régime for which Article 82 EC provides. On that view, under Article 3 of the proposed Regulation, Article 82 EC would provide merely a minimum competition law provision so far as unilateral conduct is concerned.
- 2.12. Further questions might arise where a monopoly reference not limited to the facts concerned a market that was dominated by a true monopolist. Even in the absence of abusive conduct, the existence of the monopoly might be against the UK public interest. Would Article 3 exclude use of the powers under the Fair Trading Act 1973 to remedy such a situation? And even if abuses were established would Article 3 allow the imposition of *structural remedies* by the UK competition authorities?
- 2.13. This last question arises because, under Article 7 of the proposed Regulation, the *EC Commission* would have power to impose "structural remedies", including divestiture of certain assets, when it finds an infringement of Article 82 EC (or indeed Article 81

EC)². By contrast, Article 5 of the proposed Regulation refers to the *national authorities* having only a power to accept commitments or impose fines, periodic penalty payments or *any other penalty* provided for in their national law and says nothing about structural remedies such as are expressly referred to in Article 7³.

2.14. In any event, it might be thought anomalous if structural remedies might be imposed under both the FTA 1973 and under UK legislation introduced to implement the Regulation. Under the FTA, structural remedies can generally be imposed only by a statutory instrument that has been positively approved by both Houses of Parliament, with the result that the affected undertaking can petition the House of Lords to appoint a Select Committee to examine and report on the statutory instrument⁴. By contrast, structural remedies imposed to bring an end to infringements of Article 82 EC would presumably be imposed by the DGFT with an appeal to the Competition Commission Appeal Tribunal.

3. "Complex monopoly situations"

3.1. Article 3 of the Regulation would similarly pose questions in relation to the treatment of "complex monopoly situations"⁵ where -

- (a) the conduct giving rise to the complex monopoly situation has an actual or potential effect on trade between Member States (otherwise Community law will have no bearing on the situation);
- (b) the conduct is not constituted by agreements between the "complex monopolists" and third parties such that there is a network of restrictive agreements which attracts the operation of Article 81 EC (in which case, presumably the situation will fall to be dealt with by the DGFT under Article 81 EC and not under the FTA⁶);
- (c) the conduct is not engaged in pursuant to a concerted practice between the complex monopolists (in which case, presumably once again the situation will fall to be dealt with by the DGFT exclusively under Article 81 EC and not under the FTA⁷);
- (d) the "complex monopolists" do not enjoy a joint dominant position (in which case, perhaps the situation will fall to be dealt with by the DGFT under Article 82 EC and not under the FTA).

3.2. My parenthetic conclusions at 3.1(b) and (c) are in line with the situation in practice today under UK national law in that the DGFT will not refer to the Competition Commission under the monopolies provisions of the FTA any situation that he believes to be remediable through proceedings for infringement of the Chapter I or Chapter II prohibitions imposed by the Competition Act 1998.

3.3. But my parenthetic conclusion at 3.1(d) is necessarily more guarded. Provided that the conduct that gives rise to the complex monopoly situation is unilateral, it will

² Given that a dominant position is not in itself unlawful under Article 81 or Article 82 EC, it is not easy to see how a structural remedy can be "necessary", within the meaning of Article 7 of the proposed Regulation, for the purpose of bringing to an end an infringement of either of those Articles, in the sense that no lesser remedy would suffice.

³ Presumably if, in any case, the national authorities are obliged to apply Article 81 or Article 82 EC and are capable of being empowered to impose structural remedies, despite the apparently restrictive wording of Article 5 of the proposed Regulation, they too will be able to exercise the power only if it is "necessary" to do so, as to which see footnote 2 above.

⁴ Query whether in any event this procedure now causes problems under the Human Rights Act 1998 read in conjunction with Article 6(1) of the ECHR.

⁵ At the risk of oversimplification, a complex monopoly situation exists, by virtue of section 6 or 7 of the FTA, where, whether voluntarily or not and whether by agreement or not, two or more undertakings so conduct their respective affairs as in any way to prevent, restrict or distort competition.

⁶ See paragraph 1.4 above.

⁷ *Ibid.*

probably continue to be remediable, and, in practice, sometimes remedied, under the FTA, whether or not the conduct may affect trade between Member States. That may be important because of the potential difficulty of proving collective dominance. In the result it would seem that oligopolists will not be able to frustrate a monopoly reference by claiming that they enjoy a position of collective dominance and, on the assumption that the conduct in issue may affect trade between Member States, that they are therefore susceptible to attack only under Article 82 EC.

4. What is “competition law” within the meaning of Article 3 of the proposed Regulation?

- 4.1. Certain UK legislation clearly constitutes “competition law” within the meaning of Article 3 of the proposed Regulation, namely Part IV of the FTA 1973 and Chapters I and II of the Competition Act 1998. Conversely, it seems unlikely that the Commission intends to exclude the application of national legislation providing for the regulation of liberalised utilities (which, in any event, is in many cases based on Community directives) though that could be made clearer in Article 3 of the proposed Regulation; and the same is true generally of the attachment of conditions to the grant of special rights to undertakings entrusted with the operation of services of a general economic interest within the limits allowed by Article 86(1) EC. In any event, in so far as the regulated conduct is unilateral, it is thought that even national “competition law” is not excluded unless the conduct constitutes an abuse of a dominant position that may affect trade between Member States (see paragraph 1.4 above).
- 4.2. Laws that prohibit “unfair competition”, such as the prohibition of passing-off, and in some Member States, the prohibition of slavish imitation, are, it is thought, not intended to be caught by Article 3 of the proposed Regulation, though the prohibited conduct is generally unilateral; so that, it is thought, no problem will then arise. Nor is national merger control, in so far as it is still applicable, intended to be caught by Article 3 though, here again, that fact could be made clearer in the Regulation as enacted.
- 4.3. But the dividing line may not always be easy to draw. Is the US Robinson-Patman Act “competition law”? and, if so, would such legislation in a Member State be deemed to regulate the making of agreements between the supplier and its individual customers (in which case it would seem that, as a result of the proposed Article 3, if the agreements might affect trade between Member States, Article 81 EC would displace the national legislation and the agreements would generally enjoy exemption under the block exemption for vertical agreements) or would such legislation be deemed to regulate the unilateral conduct of the supplier in relation to the granting of discriminatory trade terms to its various customers (in which case it would seem that, as a result of the proposed Article 3, the national legislation could continue to be applied even if the price discrimination had an actual or potential effect on trade between Member States).
- 4.4. The common law doctrine of restraint of trade may be in part within and in part outside “competition law” within the meaning of Article 3. Thus, in so far as the common law doctrine applies to agreements between undertakings, its application would seem to be excluded by Article 3 if the agreement may affect trade between Member States, but that may present some nice questions when one comes to deal with vendor-purchaser and employer-employee covenants.
- 4.5. Article 81 EC applies only to agreements *between undertakings* and decisions by associations of undertakings which are akin to agreements *between undertakings*. Although Article 3 of the proposed Regulation does not include the words “between undertakings”, they are surely to be implied. The difficulty is that, when an individual who carries on a business, including a professional practice, comes to sell

it and, under the contract of sale, enters into a restrictive covenant, he is treated by Community law as an undertaking; but the covenant may apply to him not only as an undertaking but also potentially as an employee (of another undertaking) after completion of the sale. By contrast when the employee enters into a restrictive covenant he is not an undertaking but the covenant may apply to him not only as an employee (of another undertaking) but also potentially as an undertaking (on his own account) after termination of his original employment.

- 4.6. Where the restrictive covenant is unreasonable in its scope or duration, the vendor or ex-employee may want to rely on that fact to avoid the obligations imposed upon him by the covenant. If at the time when the covenant is sought to be enforced against him, he is an employee of another undertaking and the covenant is applicable to him in that capacity, he is not then himself an undertaking; and even though, in the case of a vendor, he was an undertaking at the time when the agreement was made, it is well arguable that the agreement that is sought to be enforced is not an agreement between undertakings. In that case, Article 81 EC will be inapplicable and Article 3 of the Regulation will clearly not exclude the application of the common law doctrine of restraint of trade.
- 4.7. If, however, at the time when the covenant is sought to be enforced against him, the vendor or ex-employee has set up in business on his own account, and the covenant is applicable to him in that capacity, he will then himself be an undertaking; and even though, in the case of the ex-employee, he was not an undertaking when the agreement was made, it is arguable that the agreement that is sought to be enforced is an agreement between undertakings. If so, then in principle Article 81 EC will apply to the exclusion of national competition law; and if the common law doctrine constitutes national "competition law", it will be excluded. But in that case, however unreasonable the covenant may be, in scope or duration, there is likely to be considerable dispute as to whether it has an appreciable effect in any "relevant market". If not, Article 81(1) will not apply and the purchaser/ex-employer will be constrained by neither national nor Community competition law and will be able to enforce the (*ex hypothesi*) unreasonably restrictive covenant. The moral would seem to be that the vendor/ex-employee who wishes to engage in conduct that is prohibited by a covenant and wishes to rely on the excessive scope or duration of the covenant by way of defence to its enforcement may be best advised to work, if practicable, as an employee of another undertaking rather than setting himself up as a business on his own account⁸.
- 4.8. Alternatively, assuming that the agreement that contains the covenant has an actual or potential effect on trade between Member States, then if any potential difficulties of establishing a sufficiently appreciable effect of the covenant in any relevant market are overcome, Article 81 EC may apply to the agreement (and do so to the exclusion of the common law doctrine). In that case where the covenant is unreasonably wide, a more limited covenant might be justifiable but the unreasonable may not be severable from the reasonable using the "blue pencil" test. In those circumstances, Community law suggests that Article 81(3) may, at least sometimes, be applicable to enable the covenant to be enforced in so far as it is justifiable, e.g. for 5 years but not for the 10 years stipulated in the covenant: *cf. Nutricia* [1984] 2 CMLR 165 upheld by the ECJ in Case 42/84, *Remia v. Commission* [1985] ECR 2545. Here again therefore, the vendor/ex-employee may be better off as an employee of another undertaking (and therefore a person to whom the common law doctrine of restraint of trade will apply, so than any severance will have

⁸ I am indebted to Mr. John Wotton of Allen & Overy for his valuable comments on this aspect of the present Paper.

to satisfy the “blue pencil” test) rather than as an undertaking on his own account to which Article 81, including Article 81(3), may be applicable.

5. Conclusion

- 5.1. Divergences between the competition laws of different Member States can themselves distort competition and they certainly militate against fuller integration of the single market (e.g. consider the case of the multinational supplier and the multinational trade purchaser who wish to enter into a single contract to govern the supply and acquisition of certain goods or services in all or many Member States). In principle therefore a provision of the kind proposed in Article 3 of the draft Regulation is to be welcomed.
- 5.2. In principle it also seems right that if an agreement between undertakings, being an agreement that may affect trade between Member States, is to be attacked anywhere within the EC on competition grounds, it should be subject exclusively to the EC rules rather than, potentially, to a plethora of divergent national rules.
- 5.3. However, as we have seen, there may be problems in categorising legal rules as “competition law” or not “competition law” as the case may be.
- 5.4. The treatment of unilateral conduct is more problematic. The principle is well established that, if conduct constitutes an abuse of a dominant position in a substantial part of the Community and may affect trade between Member States, national law must provide a remedy that is both effective and no less readily available than for equivalent wrongs under national law.
- 5.5. However, a continuation of the present situation in which national competition law can be used to prohibit unilateral conduct that does not constitute an abuse of a dominant position (either because the undertaking does not enjoy a dominant position or because the conduct is not abusive) is capable of militating against the further integration of the single market (and the same is true, *a fortiori*, of national competition laws that permit structural remedies to be imposed because the very existence of the dominant position is against the public interest).
- 5.6. It would however be difficult to formulate a régime under which so far as “competition law” was concerned only EC law could be applied to unilateral conduct (where the conduct might affect trade between Member States) while leaving Member States free to apply e.g. national laws against unfair competition to unilateral conduct even if it affected trade between Member States. Article 3 therefore highlights a need to harmonise national laws against unfair competition. But since “Rome was not built in a day”, it would be unreasonable to criticise the proposed Article 3 on that account.