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# MODERNISATION – A BRAVE NEW WORLD?

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Modernisation has recently celebrated its second birthday. Like proud parents, the European Commission and Council proclaimed its birth with lofty aspirations. The Modernisation Regulation would ‘disseminate a competition culture within the Community’,<sup>1</sup> create a system in which competition is not distorted and in which Arts 81 and 82 of the EC Treaty would be applied effectively and uniformly throughout the Community. Agreements and concerted practices would be assessed on a level playing field through simplified administrative procedures avoiding excessive costs for undertakings.<sup>2</sup>

The entry to the world of the Modernisation Regulation on 1 May 2004, coincided with enlargement of the EU to 25 Member States (soon to be 27). As modernisation takes its first steps in this brave new world, it is useful to reflect on its first milestones and teething problems. Is modernisation the blue-eyed darling that is the apple of its parents’ eye or an ‘enfant terrible’ that threatens to bring the house down?

## THE DECENTRALISATION PROCESS

The Commission’s decentralisation is modelled on a glass pyramid – with the Commission at the top delegating to the designated national competition authorities in the 25 Member States and liaising with the national courts. The intention is to create transparency of information and seamless cooperation between them. But, is this a beautiful prism or are the stress fractures beginning to show?

It is early days but already there have been criticisms of the decentralisation process:

- **Case allocation:** the Modernisation Regulation was drafted with little thought of transitional arrangements for existing cases within the system. The European Competition Network (ECN) appears to have adopted a broad brush approach – any cases pending before the national competition authorities (NCAs) as of 1 May 2004 continue to be assessed on that basis. There are several examples of cases where, undertakings continue to be exposed to multiple competition law investigations. The Commission has, to date,

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<sup>1</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (2003) OJ L 1/1, Recital 1 (Modernisation Regulation).

<sup>2</sup> Ibid, Recitals 2, 3 and 8.

refrained from exercising its powers under Art 11(6) to relieve the NCAs of competence, even where the investigations involve more than three Member States. A vivid example of this is the payment card interchange investigations where MasterCard and Visa currently face formal or informal investigation in over 10 Member States. In the UK *MasterCard* proceedings,<sup>3</sup> the Competition Appeal Tribunal (CAT) commented 'We wonder ... whether the modernisation system is actually working as it is intended to do at the moment'.

- **Consistency:** a central feature of the modernisation regime is consistency. Effective competition law enforcement throughout the Community will only be achieved if the ECN achieves uniformity in decision-making. Differences in the application of Arts 81 and 82 EC between the various Member States will only serve to fragment the internal market and distort competition. Article 16 of the Modernisation Regulation sets out the mechanics for achieving the 'uniform application of Community competition law'. This replicates the case-law of the European Court of Justice (ECJ) in *Delimitis v Henninger Bräu AG*<sup>4</sup> and *Masterfoods Ltd v HB Ice Cream Ltd*.<sup>5</sup>

However vital questions were left unanswered, some of which fell to be determined by the House of Lords in *Crehan v Inntrepreneur Pub Co (CPC) (Office of Fair Trading intervening)*<sup>6</sup> without making a preliminary reference to the ECJ. The House of Lords took the view that national courts were not bound by previous findings of fact or economic assessment in prior Commission decisions in related cases, even if they concerned the same market. The national judge is entitled to form his own view on issues such as the relevant market, market power and foreclosure; although the judge may take the Commission's assessment into account as relevant evidence, he/she is not obliged to follow it. It is not clear whether NCAs have the same freedom.

- **Exchange of information:** given the importance of consistency and the close cooperation between the members of the ECN, it is surprising that the Modernisation Regulation failed to consider the practical implications of the type of information that can be exchanged within the network. Article 12 of the Modernisation Regulation provides for the blanket exchange of 'any matter of fact or law', even if that information is confidential. It is striking that the Commission overlooked the treatment of privileged information or information provided as part of a leniency notice. The Commission has had to scurry to deal with such matters in its Cooperation Notices and bilateral arrangements with NCAs, which do not have the force of primary legislation. These complex arrangements mean that undertakings may have to make separate leniency applications to different NCAs involving the expense of instructing different sets of lawyers. They also face a 'disclosure minefield', where privileged information that should be protected in one Member State faces the risk of

<sup>3</sup> *MasterCard UK Members Forum Ltd and others v Office of Fair Trading supported by the British Retail Consortium* (Cases 1054-1056/1/1/05), case management conference, see <http://www.catribunal.org.uk/documents/Tran105456Master310306.pdf>. The OFT's decision was eventually set aside – see [2006] CAT 14, [2006] CompAR 595.

<sup>4</sup> (Case C-234/89) [1991] ECR I-935.

<sup>5</sup> (Case C-344/98) [2000] ECR I-11369.

<sup>6</sup> [2006] UKHL 38, [2006] 4 All ER 465.

disclosure and circulation within the ECN (or, worse still, to competition authorities or courts in other jurisdictions). This situation is far removed from the simplified administrative procedures and avoidance of excessive costs aspired to by the Modernisation Regulation.

## ROLE OF NATIONAL COURTS

Modernisation, in the light of the ECJ's landmark judgment in *Courage Ltd v Crehan*,<sup>7</sup> has empowered national courts by developing their specific role in the private enforcement of EC competition law.

National courts:

- are now under a duty to apply Arts 81 and 82 EC in their entirety;<sup>8</sup>
- must ensure effective and prompt relief for claimants whose Community rights have been infringed;
- carry out the sophisticated balancing exercise under Art 81(3) EC and weigh the positive and negative effects of the particular restriction in the public interest.

It is notable that although the Modernisation Regulation tells national courts *what* to do, it does not give clear instructions as to *how* to do it. It is a telling observation that of the 45 provisions in the Modernisation Regulation, only two and a half deal specifically with national courts.<sup>9</sup> Further, national courts have been left out of the 'ECN' (the exclusive club comprising the Commission and the designated NCAs). National courts therefore have an uncertain role, as the intricacies of their dealings with the Commission, the NCAs and, indeed, other national courts are left relatively undefined.

It is strange that the Modernisation Regulation has taken such pains to detail the functions of the ECN yet has left out the national courts who will be responsible for determining appeals (often on the merits) from the decisions of the NCAs and for determining the scope of influence of the findings reached by the European Commission. Moreover, abstract procedural rules such as the standard of proof, evaluation of evidence and disclosure may have a disproportionate influence on the outcome of any given case and therefore produce inconsistencies in competition law enforcement.

The oversight arises from the fact that the Modernisation Regulation is not a measure of procedural harmonisation. It is clear from Recital 5 that the Regulation 'affects neither national rules on the standard of proof nor obligations of competition authorities and courts of the Member States to ascertain the relevant facts of a case, provided that such rules and obligations are compatible with general principles of Community law'.

<sup>7</sup> (Case C-453/99) [2001] ECR I-6297

<sup>8</sup> Article 6 of Regulation 1/2003.

<sup>9</sup> Article 6 – powers to apply Arts 81 and 82; Art 15 – cooperation and Art 16(1) – consistency.

The ECJ in *Manfredi v Lloyd Adriatico Assicurazioni SpA*, *Cannito v Fondiaria Sai SpA*, *Tricarico and Murgolo v Assitalia SpA*<sup>10</sup> has recently confirmed that matters of procedural law, such as causation and limitation are, in absence of any Community provisions, to be determined by national law. The only controls are that national rules of procedure comply with the requirements of equality and effectiveness or other fundamental Community principles.

It is worth spending some attention on the implications of national procedural autonomy for the effective and uniform enforcement of Community competition law. We can look at various different scenarios.

### **What if no national rule of procedure exists?**

It may seem trite but, in some Member States (particularly the accession countries), the 'litigation culture' is relatively under-developed. In the UK, we are used to the courts having inherent powers and flexible rules of case management so that they can determine their own procedure by reference to the individual requirements of justice in a given case. Other Member States are not as 'liberal' and have a stricter view of the constitutional role of the judiciary. In such systems, the courts can only act within defined statutory limits and cannot, for example, raise matters of their own motion.

The UK is the only Member State to have a specialist competition tribunal. Other Member States leave the determination of competition law claims to ordinary judges who operate within the existing framework of civil procedural rules. These rules are not specifically designed to deal with often complex economic matters or the vast amount of disclosure and confidentiality issues that competition law cases generate.

One can understand the reticence of a relatively inexperienced judge to start making up the rule book as he goes along in pursuit of the effective enforcement of competition law. It is by no means clear that the duty of sincere cooperation in Art 10 EC is a sufficient basis to justify proactive judicial activism.

### **What if the applicable national procedural rules deny effective relief?**

National courts are, as part of their duties under Art 10 EC, under an obligation to ensure effective relief for breaches of Community law and to set aside conflicting national rules. However, it would take a brave judge (especially one at first instance) to drive a cart and horse through the domestic rule book.

It is evident from the examples of the *Factortame*<sup>11</sup> and the *Crehan* litigation, how much time and expense is needed to challenge domestic procedural rules via a circuitous visit to the ECJ

<sup>10</sup> (Joined Cases C-295/04, C-296/04, C-297/04 and C-298/04) [2006] All ER (D) 177 (Jul), at paras 26 and 27.

<sup>11</sup> The case-law is vast, see generally, *R v Secretary of State for Transport ex parte Factortame and Others* [1989] 2 CMLR 353, CA; *R v Secretary of State for Transport ex parte Factortame Ltd* [1990] 2 AC 85, HL; *R v Secretary*

and numerous appeals through the English courts. This issue of procedure is only a preliminary issue – the parties may have to repeat the process to sort out substantive relief.

### Divergences in national procedural rules

The ECJ's ruling in *Manfredi* is somewhat Delphic regarding the limits of procedural autonomy. The determination of rules relating to issues such as causation, the availability of exemplary damages and limitation are up to a national court provided it observes the principles of effectiveness and equivalence. However, the dividing line between procedural rules and rules of substance is not clear. For example, are the rules dealing with the passing on defence and the position of indirect purchasers in damages actions, substantive rules regarding the application of Art 81 EC or are they procedural rules of remoteness?

Rules such as privilege, disclosure and admissibility of evidence may not be part of the substantive law itself but are capable of influencing the substantive outcome. Similarly, the types and availability of remedies vary from Member State to Member State. For example, differing conditions and evidential thresholds for injunctions or summary judgment, the need to provide security for costs and rules on the quantification of damages will all have an impact on the effectiveness and timing of relief.

In its Green Paper on damages,<sup>12</sup> the Commission draws attention to the barriers to private enforcement of Community competition law – especially the information asymmetry between claimants and defendants and complications with the burden and standard of proof. These difficulties often act as a deterrent to bringing a claim in the first place.

The assessment of evidence and the standard of proof may vary to such an extent as to lead to a different outcome in substance. For example, in *JFE Engineering Corp and Others v European Commission*,<sup>13</sup> the Court of First Instance (CFI) seems to imply that a quasi-criminal standard of proof of beyond reasonable doubt applies:

‘Where there is doubt, the benefit of that doubt must be given to the undertakings accused of the infringement ... The Court cannot therefore conclude that the Commission has established the existence of the infringement at issue to the requisite legal standard if it still entertains doubts on that point, in particular in proceedings for the annulment of a decision imposing a fine.’

The court continued:

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*of State for Transport ex parte Factortame Ltd and Others (No 2)* (Case C-213/89) [1991] 1 AC 603, HL; *R v Secretary of State for Transport ex parte Factortame Ltd and Others (No 3)* (Case C-221/89) [1992] QB 680; ECJ.

<sup>12</sup> European Commission (2005), *Green Paper – Damages actions for breach of the EC antitrust rules*, COM(2005) 672, SEC(2005) 1732, 19 December 2005 (Green Paper).

<sup>13</sup> (Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00) [2004] ECR II-2501, at paras 173 and 177.

'Given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies in particular to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments. ... the Commission must produce sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place.'

Yet, in *Replica Kits*,<sup>14</sup> the Competition Appeal Tribunal has confirmed that the civil standard of proof on the balance of probabilities applies, although the quality of individual pieces of evidence may vary according to the seriousness of the allegations. In the majority of cases, differences in the precise formulation of the test will not be material for the assessment of Art 81(1) EC but there may be cases which turn on the interpretation of a single piece of fragmentary evidence where the allowance of reasonable doubt may make a difference.

Similarly, the standard of proof applicable for satisfying the requirements of Art 81(3) EC has not been prescribed by the Modernisation Regulation and there is very little authority on this at Community level. With the abolition of the notification regime, this is a potential area for inconsistency between national court determinations. In recent cases, the Commission appears to be exacting a standard that is close to 'beyond all reasonable doubt' for establishing efficiencies and consumer benefit. For example, current Commission practice is to reject arguments made on economic or statistical analysis in circumstances where it is impossible to adduce concrete factual evidence. However, is such a high standard justifiable when the assessment of Art 81(3) EC itself does not entail serious or penal allegations? Surely the standard of proof or the evidential requirements should work *in the opposite direction* to afford the undertaking concerned the benefit of reasonable doubt?

An interesting issue raised by the Green Paper is whether the standard of proof should be tilted or the evidential requirements lowered in favour of a small litigant that is disadvantaged in a *David v Goliath* situation. If that approach is followed but left to the discretion of the national judge determining the dispute, the ramifications for Community competition law enforcement could be considerable.

In practice, divergences in national procedural rules mean one thing: forum shopping.

With high stakes at play, defendants will seek to deploy jurisdictional arguments to wrestle the case away from the courts of one Member State and before a court where it considers the procedural regime to be more favourable. Likewise, claimants will be keen to seize a court with flexible rules of disclosure, low costs and prompt relief. However, the Modernisation Regulation is silent on conflicts of this sort. There is no discussion of jurisdiction or the applicable law for determining competition law disputes. It is not clear that that the general

<sup>14</sup> *JJB Sports plc v Office of Fair Trading; Allsports Ltd v Office of Fair Trading* (Case No 1021/1/1/03 and No 1022/1/1/03) [2004] CAT 17, [2005] CompAR 29, at paras [192] and [197]–[204].

jurisdictional rules in the Brussels I Regulation<sup>15</sup> are sophisticated enough to cope with the diverse characterisation of competition law claims throughout the Community.

Some examples:

- Should Community competition law claims be characterised as a matter relating to a contract or a tort? In *Provimi Ltd v Aventis Animal Nutrition SA and other actions*,<sup>16</sup> the High Court ruled that, for the purpose of English law, a claim for competition law damages is founded on a tortious breach of statutory duty. Yet as a matter of Community law, claims relating to Arts 81 and 82 EC should be treated as autonomous concepts of Community law.
- Interestingly, in the proposed Rome II Regulation,<sup>17</sup> antitrust matters are characterised (for the purpose of determining the applicable law) as matters relating to a tort or delict. Applying the same analysis to determine jurisdiction, save in consumer claims, the courts of the place where the harmful event occurred, which have rise to where the harmful event occurred, which have rise to the damage suffered, would have jurisdiction pursuant to Art 5(3) of the Brussels Regulation .
- That approach may be apposite for claims relating to Art 82 EC where there is no contractual relationship in place. However, claims involving contractual abuses under Art 82 EC or contractual issues under Art 81 EC, for example, the validity of terms in an exclusive distribution agreement, would be more akin to a matter relating to a contract. On that premise, such claims would, under Art 5(1) of the Brussels I Regulation, be heard in the court of the place of performance of the principal contractual obligation.
- The problem with the tortious basis for jurisdiction is that anti-competitive practices are likely to have effects in multiple Member States. This means that undertakings will face proceedings in countries wherever claimants claim to have suffered loss. The courts will not (in absence of any contractual jurisdiction clause) have exclusive jurisdiction over related claims and there is no obligation in the Brussels I Regulation for a court to decline jurisdiction in favour of another court that is also exercising non-exclusive jurisdiction.

This is where the silence of the Modernisation Regulation becomes ominous. It has conferred an important task on national courts to ensure the effective enforcement of Community competition law, but has established no real mechanism for judicial cooperation in that process. There are no mechanics to deal with group litigation, related claims or consolidating claims before one *forum conveniens*.

<sup>15</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2001) OJ L 12/1 (Brussels I Regulation).

<sup>16</sup> [2003] EWHC 961 (Comm), [2003] All ER (D) 59 (Jun).

<sup>17</sup> Commission's Proposal dated 22 July 2003 for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations COM(2003) 427 final, 2003/0168 (COD) (Rome II), Art 5.

## CONCLUSION

The Modernisation Regulation aspires to 'disseminate a competition culture within the Community' but should only be seen as a first step in that process. Although a significant part of the decentralisation process was to empower national courts in the enforcement of Community competition law, the Modernisation Regulation has focused predominantly on the administrative regime rather than on judicial enforcement. The Modernisation Regulation was never intended to be a measure of procedural harmonisation. Accordingly there are significant gaps: the national courts are excluded from the ECN and do not have their own cooperation and information exchange mechanisms.

In the absence of detailed procedural harmonisation at Community level, it is hard to see how the modernisation aims of uniform enforcement and the creation of a level playing field can be secured. Decentralisation may have bitten off more than it can chew. The only answer is to complete the family with another sibling – this time setting out the detailed mechanics for judicial enforcement for national courts.<sup>18</sup> Otherwise the brainchild of modernisation may well find that it has started to run before it can walk.

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<sup>18</sup> Notwithstanding the principle of procedural autonomy, there is a precedent for Community procedural harmonisation in the Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (1989) OJ L 395/33, and Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (1992) OJ L 76/14 (Public Procurement Remedies Directives).