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Chantal Momege

Valerie Landes

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European Law

CHANTAL MOMÈGE AND VALÉRIE LANDES*

I. General Overview

During 1997 the European Union (EU) had a number of significant concerns. Ending two years of preparations and negotiations designed to propose the third revision of the European treaties, a new Treaty was signed in Amsterdam on October 2, 1997. The signing opened the way to ratification by Member States and the Treaty should come into force on January 1, 1999. The objective of the new Treaty was, *inter alia*, to correct imperfections of the Maastricht Treaty and to prepare the EU institutions for the enlargement to East European countries (which implied, in particular, negotiations on the decision making process of the EU).

The Amsterdam Treaty is indeed a mitigated success. The introduction of a chapter on employment (which may induce the launch of a joint EU approach to combat unemployment) and a strengthening of measures linked to environment and public health can be considered some of the most noticeable improvements. However, owing to a lack of political will, the Amsterdam Treaty failed to set up the architecture for an enlarged Union. Negotiations on institutional reform have been deferred until the eve of the enlargement when Member States will come under pressure from countries waiting to join the EU.

Nevertheless, at the Council of Ministers of December 1997 held in Luxembourg, the Member States officially decided to launch the enlargement process with ten countries of Central and Eastern Europe and Cyprus. The EU Ministers agreed that, as a prerequisite for enlargement of the Union, the operation of the EU institutions must be strengthened and improved. The task in the years ahead will be to prepare the applicant States for accession and the Union for enlargement. The EU Commission will make proposals on the issues relating to the European Communities.

Finally, as the EU Ministers pointed out during the European Council of Luxembourg, the major part of the arrangements necessary for transition to the single currency (the Euro) is now in place. The Stability and Growth Pact and the legislative texts concerning the legal status of the Euro have been adopted. Accordingly, Euro notes and coins will be introduced on January 1, 2002.

*Chantal Momège and Valérie Landes are members of the Alliance of European Lawyers in Brussels, Belgium.

II. Competition Law

Apart from the traditional series of condemnations or exemptions of agreements and practices, 1997 produced a number of important regulatory initiatives.

A. MERGER CONTROL

On the basis of the European Community (EC) Merger Control Regulation,¹ the Commission must be notified of mergers and acquisitions with a Community dimension; then, the Commission reviews whether these transactions cause antitrust concerns. At the beginning of 1996, the Commission suggested in a Green Paper a few changes and improvements concerning the application of the Merger Regulation. Ending the debate that followed the presentation of the Green Paper as well as a proposal from the Commission, the EC Member States adopted a new set of rules which will enter into force on March 1, 1998.² The various Member States were reluctant to lower the Community thresholds (beyond which the merger is deemed of Community dimension and has to be notified) below those thresholds it had offered in its proposal of September 1996. Nevertheless, to avoid multiple national filings, they agreed that the Community dimension criteria should be revised to bring cases under the Merger Regulation which otherwise would be notifiable in several EC Member States.

Indeed, in addition to the cases which already required compulsory notification to the European Commission under the previous system, mergers will also fall under the Merger Regulation if the following conditions are met:

- a) the combined aggregate worldwide turnover of all the undertakings concerned is more than European Currency Unit (ECU) 2.5 billion;
- b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than ECU 100 million;
- c) in each of the three Member States included for the purpose of (b), the aggregate turnover of each of at least two of the undertakings concerned is more than ECU 25 million; and
- d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 100 million; unless
- e) each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

Among the other main changes, full-function cooperative joint ventures will be subject to the procedures of the Merger Regulation; they will be assessed both under the Merger Regulation and under article 85 of the EC Treaty (relating to agreements). Finally, the new Regulations contain modifications to the existing system with respect to the Community dimension of mergers between credit and financial institutions, referrals to Member States, conditions and obligations which can be attached to a first phase clearance decision, and the suspension period.

B. COMMISSION'S NOTICE ON THE DEFINITION OF THE RELEVANT MARKET

On October 8, 1997, the Commission adopted a Notice of the market definition that explains how the commission is likely to define the relevant market in its enforcement of EC competition

1. Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, 1990 O.J. (L 257) 13.

2. Council Regulation 1310/97 on the Control of Concentrations Between Undertakings, 1997 O.J. (L 180) 1.

law.³ The principles are designed to be applied to all competition cases, mergers, agreements, and abuses of dominant position. It should be noted that the Commission considers competitive constraints arising from demand substitution and (to a lesser extent) supply substitution. As far as demand substitutes are concerned, the traditional criteria of market definition (characteristics, intended use, and prices) are no longer considered the most adequate. Following the approach of the U.S. Horizontal Merger Guidelines, the EC Notice adheres to the "Small but Significant and Non-Transitory Increase in Prices" (SSNIP) test.

The SSNIP test implies that we take into account the product that the merger parties are selling and explore what would happen if a hypothetical monopolist would raise prices in the range of five percent to ten percent. If such price increase would not be profitable because of customers switching to other products, the products that constrain the price increase must be included in the market definition. Contrary to previous drafts, the Notice no longer suggests that the SSNIP test is the only available approach (since it can be difficult to use, especially if non-market data are not available), but the Notice does state that the SSNIP test will be favored. Supply substitution is taken into account only when suppliers are able to switch production to the relevant products and to market them in the short term without incurring significant costs or risks. Again, this supply side substitutability must be evaluated in the context of an SSNIP.

C. ACCESS TO THE FILE

On January 23, 1997, the Commission adopted a Notice on the internal rules of procedure relating to file access in competition cases.⁴ The Notice summarizes the state of the law as defined by the EC Court of Justice. This Notice includes Merger control cases but excludes state aids. It focuses on the rights of the undertakings that are subject to investigations and, to only a marginal extent, on the rights of complainants.

Under the Notice of the Commission, undertakings under investigation must be given access to all the documents contained in the Commission file apart from internal documents of the Commission, confidential information, and documents containing business secrets. According to the Notice, business secrets relate to strategic information essential to companies and to the operation or development of their business. Business secrets that provide evidence of an infringement or tend to exonerate a firm can be disclosed by the Commission for public interest reasons. Accordingly, the Notice lists the criteria that the Commission has to follow when carrying out this assessment.

Confidential documents include documents that can lead to identification of the suppliers of the information who wish to remain anonymous as well as information that is part of the undertakings' property. In principle, however, their confidential nature does not preclude their disclosure.

The Commission will set up a list of documents containing business secrets and confidential information with a short summary enabling the content and subject of the documents to be identified. On this basis, undertakings under investigation will be able to assess whether the documents are relevant to their defense and whether to request access. A significant part of the Notice is devoted to the practical arrangements for file access.

3. Commission Notice on the Market Definition, 1997 O.J. (C 372) 5.

4. Commission Notice on the Access to the File, 1997 O.J. (C 23) 3.

D. COMMISSION'S NOTICE ON AGREEMENTS OF MINOR IMPORTANCE

On October 8, 1997, the Commission adopted a new Notice on agreements of minor importance designed to replace the Notice of 1986, as amended in 1994.⁵ The new Notice lists the agreements that escape from the principle of prohibition of anticompetitive agreements because of a lack of appreciable effect upon trade between Member States or competition. Agreements below certain thresholds will not fall under the prohibition laid down in article 85(1). These thresholds are five percent market share for horizontal agreements, ten percent for vertical agreements, and five percent for agreements having both horizontal and vertical aspects.

Excluded from application of the Notice are cartels having as their object price-fixing, production or sales quotas, market sharing or sharing of sources of supply, and vertical agreements fixing resale prices or providing territorial protection. Also excluded from the Notice are agreements between small and medium-sized undertakings (firms with annual sales lower than ECU 40 million or a balance sheet total lower than ECU 27 million). However, the Commission reserves the right to intervene if these agreements significantly affect competition. Finally, as before, the 1997 Notice is not applicable when parallel networks of similar agreements exist, which on their own would fall under the Notice.

E. COMMISSION'S GUIDELINES ON ANTI-TRUST FINES

In December 1997, the EC Commissioner responsible for competition presented guidelines for fining companies or business associations that infringe Community competition law.⁶ According to the guidelines, the basic amount will be determined according to the gravity and duration of the infringement. In assessing gravity, the Commission will take into account the nature of the infringement, its actual impact on the market, and the size of the relevant geographic market. Infringements will thus be put into one of three categories: minor, serious, or very serious. The latter category, which involves, *inter alia*, price cartels or market sharing quotas and clear cut abuses of dominant position by undertakings holding a virtual monopoly, may lead to fines above 20 million U.S. dollars. Within each of these categories, the proposed scale of fines will make it possible to apply different treatment to undertakings according to the nature of the infringement committed.

With regards to duration, the Commission distinguishes between: short duration (less than one year), which does not lead to an increase of the amount of the fine; medium duration (one to five years), which leads to an increase of up to fifty percent in the amount determined for gravity; and long duration (more than five years), which leads to an additional increase of up to ten percent per year in the amount determined for gravity. The basic amount will be increased in cases of aggravating circumstances such as committing repeated infringements, refusing to cooperate or attempting to obstruct the Commission in carrying out its investigations, or playing a leading role in the infringement. Conversely, the amount of fine can be reduced in cases of attenuating circumstances such as an exclusively passive role in the infringement, non-application in full of the infringement, and existence of a reasonable doubt as to whether the restrictive conduct does indeed constitute an infringement.

In any event, the final amount calculated according to this method may not exceed ten percent of the world-wide turnover of the undertakings concerned as provided in EC Regulation n° 17 (the basic competition regulation).

5. Commission Notice on Agreements of Minor Importance, 1997 O.J. (C 372) 13.

6. Commission Guidelines, 1998 O.J. (C 9) 3.

F. COMMISSION'S NOTICE ON COOPERATION WITH NATIONAL COMPETITION AUTHORITIES

The Commission has adopted a new Notice whose purpose is to encourage undertakings to approach their national competition authorities, who are competent to apply article 85(1) (prohibiting anticompetitive agreements) and article 86 (prohibiting abuses of dominant position) provided their national law empowers them to do so.⁷ National authorities cannot, however, grant an exemption to anticompetitive practices under article 85 (3).

The Notice establishes guidelines on case allocation. Cases that have mainly national effects, no particular significance to the Community, or are unlikely to qualify for exemption under article 85(3) should be dealt with by national authorities. The Notice also focuses on cooperation between the EC Commission and national authorities with respect to agreements of which the Commission is notified. A notification asking for an exemption cannot be transferred to a national authority since only the Commission has the power to grant an exemption. In particular, if a national competition authority reviews the same agreement, it should cooperate with the Commission and, if need be, stay proceedings if there is a risk of conflicting decisions.

Finally, the Notice focuses on cooperation between the EC Commission and national authorities with respect to complaints. The Commission reserves the right to reject a complaint if the case lacks a sufficient Community interest. Under such circumstances, the Commission will refer a case to a national authority if the complainant may enjoy effective relief at the national level. In carrying out investigations, national competition authorities may request information from the Commission.

III. State Aids

During 1997 the Commission was active in the field of state aids, adopting several guidelines on the compatibility of certain types of state aids, including state aids for rescuing and restructuring firms in difficulty in the agricultural sector⁸ and state aids to the motor vehicle industry.⁹ The Commission continued its efforts to propose Block Exemption Regulations (as in the field of competition agreements) to the Council.

IV. Intellectual Property

In 1997 there were two initiatives in the field of intellectual property.

A. UTILITY MODELS

In December 1997, following a wide-ranging debate which took place in 1995-1996, the European Commission proposed to harmonize rules for the protection of inventions by utility model.¹⁰ A utility model is a registered right that confers exclusive protection for a technical invention. It resembles a patent in that the invention must be new, but unlike patents, utility models are granted as a rule without a preliminary examination to establish novelty and inventive step. Therefore, under utility models, protection can be obtained more rapidly and cheaply, but the protection conferred is less secure.

7. Commission Notice on Cooperation with National Authorities, 1997 O.J. (C 313) 3.

8. Community Guidelines on State Aid for Rescuing and Restructuring Firms in Difficulty, 1997 O.J. (C 283) 2.

9. Community Framework for State Aid to the Motor Vehicle Industry, 1997 O.J. (C 279) 1.

10. Proposal for a European Parliament and Council Directive Approximating the Legal Arrangements for the Protection of Inventions by Utility Models, 1997 O.J. (C 36) 13.

The proposal seeks to harmonize the basic rules governing, *inter alia*, the protected matter, the requirements for protectability, and the extent and duration of protection (six to ten years). As a result of the harmonization, an applicant for a utility model will be able to obtain an equivalent property right in every Member State and will no longer be confronted with a multitude of different regulations. Notably, however, biological material, chemical or pharmaceutical substances, and process and computer programs are excluded from protection.

B. COPYRIGHTS

On December 10, 1997 the Commission proposed a draft Directive on the harmonization of certain aspects of copyright and related rights in the Information Society.¹¹ The proposal defines the scope of the acts covered by the reproduction right with regard to the different beneficiaries. It also proposes to harmonize rights of communication to the public.

The draft Directive gives authors, performing artists, phonogram producers, producers of the first fixations of films, and broadcasting's organizations an exclusive right to authorize or prohibit reproductions of their work. There could be exceptions to this right such as temporary acts of reproduction that are an integral part of a technological process but which have no independent economic significance. The proposal also provides authors with an exclusive right to control any form of distribution to the public of originals or copies of their works and lists the various exceptions to this principle.

V. Consumer Protection

A. PROTECTION OF CONSUMERS IN RESPECT OF DISTANCE CONTRACTS

On May 20, 1997 the Council adopted a Directive designed to approximate the national provisions of Member States concerning distance contracts between consumers and suppliers.¹² This directive applies to contracts concerning goods or services concluded between suppliers and consumers under an organized distance sales or a service-provision scheme run by the supplier who, for the purpose of the contract, makes exclusive use of one or more means of distance communication. It does not apply to specific categories of contracts such as those related to financial services and those concluded with telecommunications operators via the use of public pay phones.

In the Council's opinion, the use of means of distance must not lead to a reduction in the information provided to the consumer. Accordingly, the Directive determines the kind of information that must be sent to the consumer. Because the consumer is not actually able to see the product or ascertain the nature of the service provided before concluding the contract, the Directive provides for a right of withdrawal. Provided that the right must be more than formal, the costs (if any) borne by the consumer when exercising the right of withdrawal are limited to the direct costs for returning the goods. Among other important provisions, the Directive prescribes a time limit for performance of the contract if this is not specified at the time of ordering. It also forbids the promotional technique involving the dispatch of a product or the provision of a service to the consumer in return for payment without a prior request from, or the explicit agreement of, the consumer.

11. Proposal for a European Parliament and Council Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, COM(97)628.

12. Council Directive 97/7 of the European Parliament and of the Council on the Protection of Consumers in Respect of Distance Contracts, 1997 O.J. (L 144) 19.

B. COMPARATIVE ADVERTISING

On October 6, 1997, the EC Council adopted a Directive that allows comparative advertising under certain conditions.¹³ These new Community rules amend the Directive adopted in 1984 (Directive 84/450/EC) concerning misleading advertising. This new Directive establishes Commission conditions of comparative advertising. Such advertising should be permitted, provided, *inter alia*, that it is not misleading, it compares goods or services meeting the same needs or intended for the same purpose, it objectively compares one or more material, relevant, verifiable, and representative features (including prices) of those goods and services, it does not denigrate trademarks or trade names, and it does not represent goods or services as imitations or replicas of goods or services bearing a protected trademark or trade name.

Furthermore, the Directive obliges Member States of the EU to ensure that adequate and effective means exist to combat misleading advertising. Such means must allow persons or organizations regarded under national law as having a legitimate interest in prohibiting misleading advertising to take legal action or to bring such advertising before a competent administrative authority, which will either decide on complaints or initiate appropriate legal proceedings. The Directive does not exclude voluntary control, which Member States may encourage by self regulating bodies.

Finally, the Directive provides that the Commission shall study the feasibility of establishing effective means to deal with cross-border complaints. Within a time limit of two years after the entry into force of the Directive (the date of entry into force is April 6, 2000), the Commission will submit a report to the European Parliament and the Council on the results of its studies, accompanied if appropriate by proposals.

VI. Environment

The most significant initiative of 1997 is the long-anticipated proposal for a revised Community eco-label scheme, which is aimed at modifying Council Regulation 880/92.¹⁴ The draft proposal affirms the basic principle of the EC eco-label scheme, which is the only product-related and demand driven voluntary policy instrument in the campaign for sustainable consumption. With a view to encouraging the development of the EC eco-label, the proposal seeks to improve the efficiency, accessibility, and transparency of the scheme. In particular, the new rules propose the introduction of a graded label attributing between one and three flowers, thereby offering greater flexibility to producers wishing to participate in the scheme. The proposal also seeks to establish a more coherent relation with national labels whereby a national eco-label might be limited to products for which no EC eco-label criteria have been established. Finally, the establishment of an independent organization, the European Eco-label Organization, should improve the system.

13. Council Directive 97/55 of the European Parliament and of the Council amending Directive 84/450 Concerning Misleading Advertising so as to Include Comparative Advertising, 1997 O.J. (L 290) 18.

14. Commission Proposal for a Revision of Council Regulation 880/92 on a Community Eco-Label Award, 1997 O.J. (C 114) 9.

