



10:1

Ten new member states – a new regulation to implement EC competition rules

On 1 May 2004, eight countries of Central and Eastern Europe will join the European Union, together with Cyprus and Malta. Far from accidentally, new provisions of the European competition law will enter into force on the same date: an amendment to the EC merger control system, as well as the new implementing regulation to govern antitrust rules and control abusive practices. This will have a major practical impact on marketing systems and M&As .

The competition rules set out in Regulation 1/2003 of the Council on the implementation of Articles 81 (prohibition of cartels) and 82 (control of abusive practices) of the EC Treaty will enter into effect on 1 May 2004. The Regulation expressly governs the relationship between competition laws at national and EC level. Under the Regulation, national competition authorities will now be chiefly competent to enforce the EC competition law, albeit in close co-operation with the Commission. The latter's investigative authorities will be extended proactively. A decentralised system of legal exceptions will replace the Commission's previous exemption monopoly: as of now, undertakings will have to assess themselves whether any of their agreements in restraint of competition as set out in Article 81 meets the prerequisites for an exception from the cartel ban. In doing their own assessment, undertakings are faced with the risk of substantial fines and the threat that such agreements may be declared null and void

NATIONAL AND EC CARTEL LAW

The new Regulation makes it abundantly clear that national and EC competition law must both

be applied in parallel to agreements that might impair trade within the common market. What is banned under the EC law must not be permitted under national law, and vice versa. An ambiguous exception is made for "unilateral conduct engaged in by undertakings", i.e. abuse of market power .

COMPETITION AUTHORITIES

Starting on 1 May 2004, it will be chiefly the national competition authorities which are responsible for enforcing the EC competition law. In Austria, these will be primarily the Oberlandesgericht of Vienna acting as cartel court and the Federal Competition Authority in a complex intermeshing system. The national competition authorities are vested with the same rights to investigate and impose decisions and sanctions that the Commission enjoys. The Commission, on the other hand, remains in overall control, continues to be authorised to initiate proceedings on its own and may take over proceedings. All authorities will be electronically linked and able to exchange information of relevance for competition .



EXEMPTION THROUGH LEGAL EXCEPTION

Previously, the Commission was the only body to authorise an exemption from the cartel ban. This monopoly is now replaced by a legal exception. In the future, undertakings will have to assess on their own and at their own risk whether they meet the prerequisites for an exemption, i.e. whether any agreement in restraint of competition:

- contributes to an improvement of the distribution or production of goods or to the furthering of technological or economic progress ,
- provides for consumers to reasonably participate in the profit thus generated ,
- without imposing unreasonable restrictions on the undertakings involved, and
- without eliminating competition for a substantial share of the products .

For undertakings to verify compliance with legal requirements, they may and must take previous decisions of the Commission and the implementation regulations themselves as a basis and point of departure. This will, at least initially, result in some degree of legal uncertainty. Whether competition-restraining agreements are effective under civil law and whether there is no risk of a fine, will be clarified only subsequently if (court or administrative) proceedings are instituted. Previously it was possible to obtain advance permits. It remains to be seen how undertakings will handle this new responsibility accorded to them .

INVESTIGATING AUTHORITY

The investigative authority of the Commission will be strengthened considerably. In addition to requesting or deciding on information, it will now be permitted to seal premises, books and records, make requests for in-depth explanations (questioning right) and search not just company premises but also the private residences of the owner and staff of an undertaking .

RESUMÉ

In an enlarged European Union of 25 member states, the Commission would not be able (on its own) to expose and prosecute infringements of the competition law. It is especially the abandonment of the exemption monopoly which is expected to yield a reduction of its work load. It goes without saying that this worthy goal will translate into additional work for the undertakings and their advisors ...



For more information on the subject please contact

Mag. Dieter Hauck
Attorney-at-law and partner

areas of practice:
IT-law, European Union law, telecommunication law, public procurement, merger and cartel law
hauck@preslmayr.at



Mag. Ruth Rosenberger
Associate

rosenberger@preslmayr.at



SPEICH PAINTS FOR PRESLMAYR

Christoph Speich, born in Switzerland in 1954, has been living and working in Vienna as a freelance painter and stage designer for many years. His latest oeuvre, entitled "Inne-Halt" (Pause & Adjourn), adorns the



foyer to our offices. It consists of more than forty layers of colour, placed atop each other by the artist, so that a kaleidoscope of colour nuances is generated depending on the angle of incidence of the light changing over time .