Eenheid in verscheidenheid
Appeldoorn, Jochen

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Summary

Unity in diversity: the decentralised application of article 81 EC

Council Regulation 1/2003 marks the dawn of a new era in the field of EC Competition law. From May 1, 2004, national courts and national competition authorities will share the Commission’s power to apply art. 81 EC as a whole, including the third paragraph, which from then on consequently will have direct effect. Relinquishing its long-kept monopoly on the granting of exemptions, the Commission has in the process also proposed, that agreements which are incompatible with art. 81(1) EC, and have hitherto been viewed as void until exempted, will instead be valid ab initio and remain so unless declared otherwise. Since that proposal has been adopted by the Council in the new Regulation, that replaces the venerable “Regulation 17” which dated from 1962, the application of a system of legal exception will be compulsory when using art. 81 EC.

Both of these elements: empowering national competition authorities, and doing away with automatic nullity, constituting in Ehlermann’s phrase a ‘legal and cultural revolution’, have raised more than a few eyebrows in academic literature. This book endeavours to answer some of the questions raised as to the compatibility of this revolution with current Community law.

The first question pertains to the compatibility of Regulation 1/2003 with the wording of art. 81 EC. Additionally, the feasibility of giving direct effect to art. 81(3) EC is examined. With regard to the compatibility with the text of
In art. 81(3) EC, the issue revolves around the question of the basis of the current exemption system. If it is based on art. 81 EC, a system of legal exception cannot be introduced without conflicting with the wording of that provision. However, it is concluded that the current system is actually based on Regulation 17 alone, with the Treaty itself containing no definitive preference. Therefore, changing that system via a new Regulation, replacing the old, is possible without diverging from the Treaty text. In addition, the Court has in the past applied a technique not unlike the approach of the new system of legal exception, thus making way for the argument that with regard to this element, changing tack is less controversial than it seems. Finally, art. 81(3) EC is found to be perfectly capable of having direct effect, irrespective of the choice between the classic van Gend en Loos criteria and the test of justiciability.

The fourth chapter looks at the only seemingly simple doctrine of supremacy. As supremacy has a somewhat different function in competition law than in other areas of Community law, the doctrine differs accordingly by having both normative and purely procedural elements. In the past multiple theories regarding the relationship between national and Community competition law have been developed: e.g. the Einschränkentheorie (single barrier theory) and the Zweischrankentheorie (double barrier theory), the latter also in various forms. At the end of the day they all share the same defect, consisting of an interpretation of the Walt Wilhelm judgment as if it were a doctrinal focal point, instead of merely being a practical solution for the problem at that time. The first draft of the new Regulation sought to diverge from the rule of Walt Wilhelm in a way that is reminiscent of the view of Walz, who wished the system of
supremacy to be overhauled. As both Walz' view and that draft cannot be matched to the current structure of supremacy, Regulation 1/2003 only passes the compatibility test because of fundamental changes made later in the legislative procedure prior to agreement on the final text. In the end, the combined action of normative and procedural elements ensure that Regulation 1/2003 stays well within the boundaries set by the seminal Wal Wilhelm judgment and the resulting principle of supremacy of Community competition law over its national counterpart.

The next chapter looks at subsidiarity, a principle rooted in western philosophy but only introduced into Community Law as a result of the Maastricht Treaty. As this principle seeks to determine when the Community is authorized to act as opposed to the Member State, it apparently performs the role of attributing powers once again, as Community law has (through the case-law of the Court of Justice) had such a mechanism for attributing powers from the start. In addition to this apparent oddity, the principle is worded sufficiently vaguely in art. 5 EC for it to be used for almost any viewpoint regarding the authority of the Community to act. Firstly, it is concluded that subsidiarity has no meaning for Community law before Maastricht. Secondly, that for a useful interpretation of art. 5 EC, one has to look elsewhere.

An obvious starting point for such a venture is the Protocol on subsidiarity, which however fails to shed new light on the Treaty article, with the exception of introducing an element of weighing the interests of the Community against those of the Member States. In this book, two origins of the subsidiarity principle are studied: initially the Papal encyclical
Quadragesimo Anno, thereafter the economic theories concerning the weighing of interests. Where the encyclical does not produce a sufficiently detailed criterion to be of any help with regard to the interpretation of art. 5 EC, the economic theory on the so called prisoner’s dilemma on the other hand succeeds. Via the anchor point found in the Protocol, the resulting economic model is introduced into art. 5 EC. This leads to the conclusion that the application of art. 81 EC should in principle be left to Member States, with the Commission stepping in only if such action represents a surplus value. Such surplus value may lie in the need of a consistent and uniform application of the Treaty article or where national authorities are, due to their lack of oversight, simply not suitable fora for the task at hand. The economic model also makes it evident that Member States, now playing a greater role in applying art. 81 EC, may only do so when their new found freedom to act is embedded in a hierarchical structure in which the Commission acts as supervisor. In acting as such, the Commission must let go of the abstract goal of ensuring complete uniformity in the application of art. 81 EC, as it is neither attainable nor desirable. The decentralised application of art. 81 EC is thus best characterised as unity in diversity. Regulation 1/2003 does not strictly adhere to this model. Compliance with the subsidiarity principle may however be accomplished by an interpretation of the final text of the Regulation, that is slightly altered in comparison with the interpretation given by the Commission. Hence, the Regulation once again succeeds in staying within the limits of current law, if only because it is possible to interpret Regulation 1/2003 in such a way as to remove the general authority to apply art. 81 EC as still envisaged by the Commission.
The final chapter is, like ancient Gaul, divided into three parts. An attempt is made to extrapolate the likely view of the Court on the current modernisation from the result of its judgments in *Masterfoods* and *Spanish Banks*, although Regulation 1/2003 did not exist at that time. Whereas in the first judgment the Court may be seen to subscribe to the viewpoint that for a successful decentralisation of the application of art. 81 EC it is necessary to have national judges bound by Commission Decisions, thus paving the way for Regulation 1/2003, the judgment in *Spanish Banks* may, according to some, at best prove to be a sword of Damocles still dangling from above. However, in the light of the new role of national competition authorities in Regulation 1/2003, it may be wondered whether the controversy, instead of being seen as Damocles' sword, should not be treated more like Macbeth's dagger, *i.e.* questioned if it is really there.

The conclusion of this book is that apart from an interpretation issue with regard to the Commission's general authority to apply art. 81 EC, Regulation 1/2003 is wholly compatible with current Community law so that possible future scrutiny by the Court is not to be feared.