UNICE
Union of Industrial and Employers' Confederations of Europe
Union des Confédérations de l'Industrie et des Employeurs d'Europe

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MODERNISATION OF EC COMPETITION LAW

Commission White Paper

UNICE COMMENTS

1. INTRODUCTION

UNICE has noted the Commission White Paper on Modernisation of the Rules implementing Articles 81 and 82 of the EC Treaty and welcomes the opportunity to give an initial reaction in this important debate. (For the sake of consistency, all references in this paper will be to the new numbering of Treaty articles).

According to the Commission it is no longer possible or desirable to maintain a centralised enforcement system through prior notifications requiring a decision by the Commission for restrictive practices which fulfil the conditions of Article 81 (3).

As stated in its 1995 discussion paper on refocusing the scope and administration of Article 81, UNICE is resolutely in favour of developing and sustaining a competitive commercial environment in the European Union and it is convinced that competition provides the best incentive for business efficiency, encourages innovation and guarantees consumers the best choice. In this discussion paper UNICE considered it opportune to question what basic changes should be made to the rules and procedures and to the interpretation of Article 81 in order to achieve a framework of competition rules appropriate to the Community's requirements of today and in the future, and it made some proposals to that effect. UNICE notes that the White Paper finds the proposals then made by UNICE insufficient to deal with the organisational and procedural deficiencies of the present system, deficiencies which themselves increase the Commission's problems.

UNICE deplores the fact that the White Paper incorrectly blames business for trying to limit as much as possible their legal exposure under the present inadequate administrative system: it is the Commission that, until corrected by the Court, tried to expand its exclusive competence as to Article 81 (3) to the widest extent possible by a strict legalistic interpretation of Article 81 (1). The Commission does not address positively UNICE's 1995 proposals to refocus the scope and administration of Article 81, which would, if followed, substantially decrease the need for further decentralisation with all its potential problems.

Having said this, UNICE endorses the objectives set out in the White Paper to refocus the Commission's implementation of Article 81, allowing it to use its resources to combat serious infringements and ease the constraints on undertakings. Although UNICE would like to reserve its judgement on decentralisation until there is a clearer indication that the Commission intends to take positive steps to address the many problems which a decentralised approach will cause, as set out below, UNICE can see advantages in abolishing the authorisation system and the requirement to notify large numbers of agreements and to this extent would welcome any resulting decrease in administrative burdens.

In the Commission White Paper, the arguments put forward to justify decentralisation by means of switching to a legal exception system having direct effect, fail adequately to come to grips with the risks of fragmentation of the internal market and degradation and re-nationalisation of competition law. Issues such as the primacy of EC law, the need to ensure coherence and avoid duplication of procedures and jurisdictional conflicts need further elaboration. Similarly, UNICE considers that companies' legitimate interest in having some form of legal certainty in specific cases receives insufficient attention.

UNICE will elaborate further on these and other issues below.

2. DECENTRALISATION: GENERAL OBSERVATIONS

1 Fragmentation of the internal market

UNICE fears that the Commission's favoured approach of a legal exception system with direct effect might lead to fragmentation of the EU internal market, especially as the Commission's proposals for ensuring coherence are not at all clear and raise strong doubt about the effective power and commitment of the Commission to intervene (see further below).

Decentralisation amplifies the risks of inconsistencies within the system. There is a real danger of re-nationalisation of competition law because national authorities and courts might bring national policy considerations into European competition law or apply national competition law rather than European competition law. A particular agreement might be treated differently depending on the climate of enforcement and particular policy priorities within each Member State, thus detracting from the uniform application of Community law. This might result in differences in the business environment from one Member State to another and is difficult to reconcile with the concept of a single market, the integrity of which should be maintained.

The Commission's proposal is built on the premise that European integration has developed to such an extent that the body of European case law will ensure sufficient guidance for business to assess their agreements, and for national authorities and courts to control these agreements by applying Article 81 as a whole. However, UNICE is concerned that at a time when many national competition authorities in Europe are only slowly developing adequate expertise to perform the complex assessments necessary under Article 81 (1), the Commission's optimistic appraisal about the present state of European integration might be too categorical. The risks of fragmentation are heightened in an enlarged EU, especially given the command economy background and the limited exposure to competition policy of many of the future new entrants.

2 Modernisation rather than decentralisation

UNICE wonders whether the Commission should not focus on modernising the substantive and procedural rules of the present system and review its working practices rather than opt exclusively for the risky approach of a full decentralisation. Following the approach planned for the field of vertical restraints, an economically more realistic view should generally be taken as regards possible adverse effects on competition. This would encourage the application of the rule of reason as adopted by the European Court (and also national courts in relation to national competition laws) and reduce unnecessary burdens on business. Especially if the exception to the notification requirement provided for in Article 4 (2) of Regulation No 17 for less serious restrictions of competition would be extended further. This would also enable the Commission and national authorities to focus on those agreements that are most likely to have an overall negative impact on competition.

Regarding its working practices, UNICE wonders whether the Commission could not take a number of procedural steps to reduce its workload. These might include accepting a time framework (as in the area of merger control) which would enhance careful advance planning and improve efficiency in handling the cases. Similarly, the Commission could accept a review of its working arrangements, such as the setting-up of project teams where knowledge and expertise is shared rather than relying on a single individual who might not always have the same level of experience dealing with a certain type of cases that could be found elsewhere in DG IV. In like manner, the Commission could consider limiting detailed publication of cases to a meaningful summary in all languages in the Official Journal, whilst the full text would be available solely in the authentic language of the case. A similar approach has been adopted under the Procedural Regulation in the field of State Aid. The Commission could also consider reducing the amount of information to be provided in Form A/B, and basing its decisions on the information thus provided. Adoption of a rule introducing the imposition of an information burden on industry, whereby the Commission would specify what information it requires and whereupon the company concerned would be obliged to provide all relevant and necessary information, could eliminate delays caused by repeated requests for information.

3 National authorities rather than national courts

In outlining its favoured approach of a legal exception system, the Commission relies very much on enforcement through the national court system. UNICE doubts whether national courts in the EU at present can be relied upon to administer Article 81 as a whole. National courts are not always comfortable when dealing with the complex arguments that arise when an agreement needs to be assessed under Article 81. Many of the decisions taken by national courts in the field of European competition law in the past relate to agreements that had not been notified to the Commission. Only a limited number of those judgements had to include a substantive economic assessment of both the anti- and pro-competitive aspects of the arrangements concerned. Enforcement of Article 81 as a whole through the hierarchy of the national courts system would as a rule impose enormous burdens on the businesses involved since such proceedings require substantial management time, are costly and can take many years. In the new system existing differences as to civil procedural law in the Member States (*e.g.* regarding standing, scope of pre-trial discovery, role of the judge as to fact-finding, scope of appeal procedures) might lead to forum shopping, and ongoing subsequent litigation in many countries. Referring questions to the Court of Justice is not a sufficiently effective mechanism to ensure effective coherence, especially since the Commission can only make observations during the preliminary procedure and will not be in a position to intervene in national court proceedings.

Moreover, the request for a preliminary ruling by the Court of Justice under Article 234 EC is very time-consuming and costly for business and there are no instruments to ensure that judges in different Member States will use this procedure in a coherent way. Problems related to poor judgements and forum shopping are augmented as a result of the fact that judgements of national courts would have the force of *res judicata* and are recognised by the courts of all Member States under the Brussels and Lugano Judgements Conventions.

Judgements will not be recognised by courts in other Member States if, say, similar, but successive cases arise in different Member States, since both the Brussels and Lugano Conventions require that the cases be pending simultaneously. Federal Courts, as they are known in the U.S., to safeguard coherent application of the law when there are jurisdictional conflicts do not exist in the internal market and a court decision applies only *inter partes* and not *erga omnes* as does an individual exemption by the Commission.

Decentralised application by national courts could encourage private litigation that would unnecessarily frustrate legitimate business plans. Moreover, it creates problems for uniform application that at present cannot be overcome, but which could be reduced if companies could file a voluntary, *i.e.* facultative notification or a retroactive notification in order to obtain from either the Commission or a national authority a decision regarding the validity of their agreement that might have retroactive effect *erga omnes* throughout the Union (see also below).

UNICE therefore considers that only national competition authorities, not national courts, in a legal exception system should have the full power to apply Article 81 as a whole. UNICE doubts whether Article 81 (3) could have "direct effect" in court as a consequence of the removal of the Commission's exclusive power to grant exemptions. In any case, as at present, national courts should be able to declare an agreement void under Article 81 (2) if the agreement on no account would be the subject of an exemption decision under Article 81 (3), regard being had to the exemption regulations and the Commission's previous decisions. Appeal should only be possible to specialised courts. All other cases where the compatibility of an agreement with Article 81 as a whole is a real issue, should be decided by a competition authority to which a national court should be able to refer the case concerned.

4 Presumption of validity

In its White Paper (at 78), the Commission states that in the new enforcement system undertakings will be able to obtain immediate execution of their contracts before national courts, with effect from the date of their conclusion, provided that the conditions of Article 81 (3) are satisfied. There would be no presumption that restrictive practices are void under Article 81. The prohibition contained in this provision is applicable only when the set conditions are met.

UNICE doubts whether the text of Article 81 alone, without further secondary legislation, would allow the conclusion that restrictive agreements are not invalid until it has been established by a competent authority or court that the agreement concerned is incompatible with the whole of Article 81. It seems that the nullity described in Article 81 (2) would be applicable as soon as a national court has declared the agreement to be null and void and such as from the date of its conclusion.

3. DUPLICATION OF PROCEDURES AND COHERENCE

Multiple proceedings before national competition authorities are costly for businesses whose activities have an impact in several Member States. They can lead to the repetition of compliance checks with European competition law on the same activity in different Member States, increasing the risk of disputes over jurisdiction, forum shopping and divergent decisions. To avoid these risks and such duplication, checks should be carried out by a single authority whose decision would have to be effective throughout the EU ('one stop shop').

UNICE is disappointed that the Commission in its White Paper does not propose a clear mechanism on the basis of generally applicable criteria for allocating cases between the Commission and national authorities.

For instance, one could think of a system where either the Commission itself would take the lead or would decide which of the different Member States concerned should take the lead on the basis of objective criteria such as turnover following the lines of the Merger Regulation. In any allocation system the possibility should exist for a decision taken by a national authority to acquire effect throughout the EU in the absence of appeal or opposition by the Commission or the Member States within a reasonably short period of time. If the national authority's decision is so opposed, the Commission should decide. Such a system would greatly improve legal certainty and coherence and would also substantially decrease the burden on business.

In addition, UNICE fears that in a European legal exception system national laws might retain the present prohibition/approval system and require notification of similar agreements to multiple national competition authorities. Such development would not be acceptable.

In a Union of fifteen Member States, and even more after new members have joined, decentralisation will inevitably lead to inconsistent application and enforcement of the law. Similar agreements would be treated differently depending on the law and practice of each Member State, thus detracting from the uniform application of Community law. If only for reasons of clarity, it should be set out specifically in Regulation 17/62 as revised, that EU law has primacy over national laws where inter-state trade is affected in order to preclude re-nationalisation of competition law. UNICE considers that the "solutions" outlined in the White Paper to resolve conflicting decisions are far from practical, and, as stated above, would like much clearer and more realistic arrangements to be put in place to avoid conflicting decisions.

4. LEGAL CERTAINTY

UNICE strongly supports the enactment of broad new safe harbour regulations, especially for the types of agreements mentioned in article 4(2) of Regulation 17 and the 1968 Notice on cooperation. This will provide legal certainty for a wider category of agreements and will restore greater freedom of contract for undertakings and will counterbalance the removal of immunity from fines as a result of the abolition of the notification system. It should be absolutely clear that in the absence of withdrawal in a particular situation (*e.g.* when abuse of a dominant position is found), the applicability of such regulation pre-empts any incompatible decision of national authorities or national courts on the basis of European or national competition law.

Since the Commission is likely to propose market share ceilings to limit the scope of such future regulations or impose an extensive list of hard core offences, these would not provide a safe harbour for agreements that fall outside. UNICE considers that especially in this grey area, the Commission's White Paper unjustly ignores companies' legitimate needs in terms of legal certainty and possible fines.

Businesses need to know that their ventures are not going to be open to challenge by a party to the agreement trying to renegotiate or renege on a deal, by a hostile competitor or by another competition authority. UNICE fears that in some cases this lack of certainty could deter investment in the EU.

In UNICE's view, as to transactions involving important investments, or *de facto* irrevocable transfers of know how, or for borderline cases, businesses should, through a lean procedure, be able to obtain, from either the Commission or a national authority, a decision regarding the validity of their agreement in the EU that might have effect *erga omnes* throughout the Union (*cf.* Article 4(2) Regulation 17). The future legal framework should therefore provide for a formal or informal procedure for companies to attain legal certainty, such as by means of business review letters, the filing of a voluntary, *i.e.* facultative notification, or simply a retroactive notification such as provided for in the framework for vertical restraints. Such a "positive decision" mechanism should be quick, efficient and of binding nature for national courts in order not to hamper investments.

The decision should be based principally on (and its effects therefore limited to) the information provided by the parties concerned and subject to clear deadlines, *e.g.* as proposed in the White Paper regarding complaints or those currently applicable under the Merger Regulation. The Commission should set out the criteria it would apply in processing requests for a positive decision (investment and/or turnover thresholds, etc.). The very existence of such a possibility will positively influence coherence in the application of national and European competition rules.

5. STRENGTHENED POWERS OF ENQUIRY

In the White Paper the Commission proposes a strengthening of its powers of enquiry, including the right to ask the undertaking's representatives or staff any questions that are justified by and related to the purpose of the investigation and to demand a full and precise answer, and the right to summon to its offices any person likely to be able to provide information that might be helpful to its enquiries.

UNICE does not share the Commission's concerns about the present procedure in relation to fact finding by the Commission's services and thus questions the need for strengthened powers of enquiry. Having said this, UNICE considers it important that appropriate safeguards are put in place to ensure fairness and due process. The rights of the defence, as a fundamental principle, must be observed. Thus, the Commission should not have the power to oblige an undertaking or its employees to provide it with answers which might involve admitting the existence of an infringement. Likewise, UNICE considers that current rules whereby qualified in-house counsel is not granted legal privilege needs to be changed and brought into line with the position enjoyed by outside lawyers. Especially in a legal exception system, companies must be allowed to use in-house counsel to carry out "privileged" self-assessment.

Furthermore, the Commission proposes an extension of the use made of information collected by the Commission or national authorities.

In addition to the safeguards set out in the White Paper, UNICE believes that all forms of information exchange should require the consent of the parties if confidential information is identified as such either by the party or by the domestic law of the supplying or receiving authority involved. However, consent alone is not enough. Exchanges should be subject to safeguards in order to ensure that information is not used for purposes other than those for which it was

requested and to avoid uncontrolled disclosure. Companies should be given notice of any exchange of confidential information and they should have the possibility to apply to a court regarding the legitimacy of the exchange. This notice should be given prior to the exchange.

Any request for information should include precise identification of the information required, a clear statement of the reasons for the request and the manner in which the information is to be used. In addition, assurances should be given that there is a substantive case rather than a mere suspicion and that the requesting authority has exhausted its own national administrative procedures and possibilities before making the request. Furthermore, assurances should be given that the information will not be disclosed outside the receiving authority, that the information will not be used for another case than that for which it was disclosed, and that the information will be subject to conditions of confidentiality at least as stringent as those of the supplying jurisdiction. Information exchanged should be subject to legal professional privilege when it would so qualify under the rules of either the supplying or receiving jurisdiction.

6. CONCLUSION

UNICE is firmly in favour of developing and sustaining a competitive commercial environment in the European Union and is convinced that competition provides the best incentive for business efficiency, encourages innovation and guarantees consumers the best choice.

UNICE notes that the Commission White Paper rejects as insufficient UNICE's earlier proposals to address the organisational and procedural deficiencies which increase the Commission's problems under the present system.

UNICE considers it necessary to question what basic changes should be made to the rules and procedures and to the interpretation of Article 81 in order to achieve a framework of competition rules appropriate to the Community's requirements of today and in the future.

UNICE considers that only national competition authorities, not national courts, should have the power to fully apply Article 81 as a whole. National courts should only be able to declare an agreement void if the agreement on no account would be the subject of an exemption decision under Article 81 (3), regard being had to the exemption regulations and the Commission's previous decisions. Appeal to specialised appeal courts should be available.

UNICE feels that a clear mechanism is required for allocating cases between national authorities and the Commission in order to prevent forum-shopping, resolve disputes over jurisdiction, prevent divergent decisions and ensure that a decision taken on a case does have effect *erga omnes* throughout the EU.

UNICE strongly supports the enactment of new, broad safe harbour regulations for all types of agreements mentioned in Article 4(2) of Regulation 17 and the 1968 Notice on cooperation. This will provide legal certainty for a wider category of agreements, will restore greater freedom of contract for undertakings and will counterbalance the removal of immunity from fines as a result of the abolition of the notification system.

UNICE considers that in important cases the Commission or a national authority should be able to decide with retroactive effect on the validity of an agreement having effect in the EU. It should be possible that such national decision be given effect *erga omnes* for the whole territory of the Union.

The very existence of such a possibility will positively influence coherence in the application of national and European competition rules.

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