UNICE

THE VOICE OF BUSINESS IN EUROPE

6/36/1 2 March 2001

MODERNISATION OF EC COMPETITION LAW

Proposal for a Council Regulation implementing Articles 81 and 82 of the Treaty

COM (2000) 582 final

UNICE COMMENTS

1. INTRODUCTION

Modernisation

Following the 1999 White Paper, on 27 September 2000 the Commission adopted a formal proposal for modernising Community competition rules, carrying on its revolutionary but in some respects risky project to create a "directly applicable exception system" to replace the current one-stop shop system of administrative authorisation centralised at Commission level.

UNICE finds the Commission's proposal surprising, not only because it does not adequately resolve concerns expressed by the business community and others in relation to the modernisation proposals outlined in the White Paper, but also because it contains some worrying new provisions which have not been mentioned before.

Competition is crucial for business; it provides the best incentive for efficiency, encourages innovation and guarantees consumers the best choice, but it is also costly. The complexity of the rules requires extensive expert advice and competition law is therefore a priority area for simplification. UNICE favours modernisation of this policy area and has repeatedly called on the Commission to act accordingly by removing unnecessary burdens and limiting regulation to matters of genuine economic importance. UNICE endorses the objectives of the Commission's reform proposals to refocus implementation of Article 81, allowing the Commission to use its resources to combat serious infringements, and can see advantages in abolishing the authorisation system and the requirement to notify large numbers of agreements.

However, having assessed the Commission's proposal for a regulation, UNICE strongly believes that additional measures will be necessary to manage the proposed modernisation properly. As for transactions involving important investments, or where the resolution of a novel issue of European competition law is at stake, businesses need to know that their ventures are not going to be open to challenge. Lack of legal predictability in such instances would deter investment in the EU and expose companies to unacceptable risks. The Commission's proposal does not ensure an appropriate level of protection for such agreements. Similarly, the Commission's proposal does not resolve the risk of multiple procedures, multiple jeopardy, forum shopping and divergent decision-making identified previously by others and us. It is essential for European competitiveness that management time and effort is not duplicated and that the outcome of procedures is the same throughout the EU, ensuring a level playing-field and maintaining the integrity of the internal market.

More generally, additional measures regarding the legal infrastructure of Member States seems unavoidable to allow adequate implementation of the proposed modernisation.

The modernisation proposals are built on the premise that European integration has developed to such an extent that the corpus of European case law, together with new block exemption regulations, guidelines and opinions, will ensure sufficient guidance for businesses to assess their agreements, and for national authorities and courts to police these agreements. However, at a time when the Commission has only recently moved away from a legalistic, clause-based approach for assessing agreements and many national competition authorities in Europe are only slowly developing adequate expertise to perform the complex economic assessments of both anti- and pro-competitive aspects of arrangements, reality may turn out to be different, especially if many inexperienced national courts are called on to consider competition issues as well.

Additional measures will be necessary to avoid great harm. Investigations should be carried out by a single authority whose decision would have to be effective across the EU in the absence of appeal or opposition by the Commission or a Member State within a reasonably short period, to avoid duplication of procedures and forum shopping. To that end, a clear mechanism on the basis of generally applicable criteria for allocating cases between the Commission and national authorities should be established. National courts should, as at present, only decide in clear-cut cases and refer all other cases to a competition authority or specialised court to reduce the risk of inconsistent or erroneous decision-making. As for transactions involving important investments, or where the resolution of a novel issue of European competition law is at stake, the Commission or a national authority should issue a decision or reasoned opinion in order to provide sufficient legal predictability as far as the validity of these arrangements is concerned.

It should also be clear that Community competition law has primacy over national competition law when inter-state trade is affected in order to create a true level playing-field within the EU. The proposal whereby EU law would prevail in cases where trade between Member States may be affected is therefore fundamental.

Unacceptable are partly-new proposals to make undertakings register certain agreements for information purposes only and to reinforce significantly investigating and remedial powers (potentially leading to the break-up of companies) without providing appropriate limitations and controls to check application of such extreme powers.

The Commission's proposal, which strongly reflects the interests of enforcers, needs to be amended to devise a better-balanced modernised Community competition policy that can be generally supported by the organisations on which the standards are targeted and which contains sensible solutions to manage the risk of divergent decision-making, harmful uncertainty and significant increases in burdens on business, and which respect fundamental rights and due process standards. UNICE calls on the Member States and the Commission to devise and insist on such solutions.

UNICE will elaborate further on these and other issues below.

2. PROPOSAL FOR A COUNCIL REGULATION IMPLEMENTING ARTICLES 81 AND 82 OF THE TREATY

1 General remarks

In the Explanatory Memorandum, the Commission announces that details of the envisaged reform will be developed further in notices. UNICE strongly regrets that, consequently, substantial elements relevant to the functioning of the proposed system remain unknown for the time being, making it very difficult to assess adequately the impact of the Commission's proposal. UNICE is of the opinion that it should be informed about the contents of the clarifying notices as soon as possible**.** An open and transparent consultation on such notices would benefit all concerned.

2 *Burden of proof (Article 2)*

The Commission proposes in Article 2 of the proposed Regulation that a party claiming the benefit of Article 81 (3) shall bear the burden of proving that the conditions of that paragraph are fulfilled. However, a competition authority shall have the power to apply the prohibition in Article 81 (1) only where the conditions of Article 81 (3) are not fulfilled. It is thus for the public authority to demonstrate that a certain agreement or practice has negative effects on the market and that the conditions of Article 81 (3) are not fulfilled if this authority wishes to impose a fine and/or prohibit implementation of the agreement or continuation of the practice.

3 Relationship between Articles 81 and 82 and national competition laws (Article 3)

UNICE is pleased that in Article 3 of the proposed Regulation, the Commission proposes that Community competition law shall apply to the exclusion of national competition laws in cases where trade between Member States may be affected. It is fundamental that competition law issues in the internal market are treated similarly and that a level playing-field for businesses is ensured. A situation where cross-border agreements are subject to review under both European competition law and the national competition laws of several Member States is unworkable for business and would greatly increase the risk of re-nationalisation of competition law at the expense of the integrity of the single market.

4 Registration of agreements (Article 4)

UNICE is very surprised that the Commission proposes in Article 4 (2) to make undertakings register certain agreements for information purposes only, and to make this information available to all competition authorities of the Member States (and possibly third countries).

One of the more appealing aspects of the Commission's modernisation proposals was the substantial reduction in bureaucratic burdens it would bring for companies and UNICE is therefore extremely worried about this proposal, which was never referred to in the White Paper.

Instead of the present voluntary notification system, which entitles the registering undertakings to a Commission reaction with at least some effect, this new proposal would introduce the possibility of a mandatory notification system without any entitlement to a reaction with legal effect. Effectively, in combination with the Commission's discretion to provide 'reasoned opinions' in just a few cases (see below), the new proposal would allow an outright abolition of the Commission's present duty to react while introducing a mandatory notification system enforced by fines. Experience elsewhere with registration schemes has proved these schemes to be of no real value (*e.g.* the UK registration scheme established by the Restrictive Trade Practices Act 1976). The Commission cannot hope to use the register to discover serious breaches of the rules, as it is unlikely that hard-core cartels would be registered.

5 Powers of national competition authorities (Article 5)

The Commission proposes in Article 5 to give national competition authorities the power to apply the prohibition of Article 81 (1) where the conditions of Article 81 (3) are not fulfilled. National competition authorities may take any decision requiring that an infringement be brought to an end, adopting interim measures, accepting commitments, imposing fines or even national penalties, and stating that there are no grounds for action.

As a general point, UNICE notes that competition authorities can often exercise their wide-ranging powers with considerable discretion and that in many cases they act in fact as prosecutor, judge, and executioner. Effective procedural safeguards in proceedings are often lacking and accountability should be enhanced. UNICE strongly believes that in anti-trust investigations effective means of early judicial review of (procedural) decisions should be available if any party

believes its rights have not been fully protected, and that public authorities should act in accordance with due process standards to counterbalance application of far-reaching powers.

As regards the powers of national competition authorities to issue decisions, UNICE regrets that the Commission does not specifically propose that national competition authorities can also issue reasoned opinions at the request of an undertaking. UNICE has always argued that the future legal framework should provide the possibility for companies to obtain from the Commission, or a national authority, a decision or reasoned opinion as regards the validity of arrangements. National competition authorities should thus be empowered to do so.

UNICE believes that the new system should provide sufficient guarantees to ensure that differences as regards national procedures and sanctions do not result in unequal treatment and forum-shopping leading to substantive differences.

6 National courts (Article 6)

UNICE doubts whether national courts in the EU can be relied on 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 and 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. Decentralised application by national courts could also encourage private litigation that would unnecessarily frustrate legitimate business plans.

Decentralised application by national courts also creates problems for uniform application that at present cannot be overcome. Thousands of tribunals throughout the Community will have to assess complex competition law issues, thereby augmenting the chance of conflicting and erroneous decision-making. Because national courts usually have to base their decisions solely on the facts as presented by the parties, the risk that decisions are taken that do not relate to factual market conditions is heightened. The Commission will be unable to compel national courts to adopt its thinking if they are unwilling so to do and it is not mandatory on the court to receive it. Referring questions to the Court of Justice with its lengthy procedures is not a sufficiently effective mechanism to ensure effective coherence.

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. The Brussels Convention does not solve this problem where different plaintiffs bring similar claims in several jurisdictions. 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.

UNICE therefore considers that, as at present, national courts should only decide in clear-cut cases, declaring an agreement void under Article 81 (2) if the agreement would on no account be the subject of an exemption decision under Article 81 (3), regard being had to the exemption regulations and previous decisions. All other cases where the compatibility of an agreement with Article 81 as a whole is an issue should be decided by a competition authority or specialised court to which a national court should refer the case. In any case, the Member States should submit a

detailed report to the Commission explaining how they intend to implement the Commission's proposal to give national courts jurisdiction to apply Article 81 (3).

7 Remedies of a structural nature (Article 7)

UNICE is very surprised that, in Article 7, the Commission proposes to give itself explicitly the power to impose remedies of a structural nature if a company infringes Article 81 or 82. The Commission now claims the right to order divestiture of assets or the breaking-up of companies in non-merger cases. This is a novelty to European competition policy and UNICE is surprised that no previous discussion has taken place on this issue, and that so little is explained in the proposal for a Regulation. No safeguards are foreseen for the exercise of this extreme power and nothing is said about the situations where structural remedies might be considered. This is unacceptable since structural remedies to date have only been suggested for application of Article 82. In UNICE's view it would be inappropriate for the Commission to have such wide-ranging power left at its discretion, especially since it has at its disposal numerous other more efficient and proportionate tools to bring breaches of competition rules to an end.

8 Interim measures (Article 8)

The Commission proposes to enable itself to order interim measures on its own initiative on the basis of a *prima facie* finding of infringement in cases of urgency due to the risk of serious and irreparable damage to competition. UNICE suggests that the Commission clarifies that interim measures can also be ordered at the request of a third party. In addition, UNICE considers that the Commission should order interim measures in the case of risk of serious or irreparable damage to a group of consumers or one or more companies, rather then the broad concept of 'competition'. Lastly, a decision ordering interim measures should not be automatically renewable; the parties must be heard again and reasons should be given.

9 Commitments (Article 9)

UNICE welcomes the fact that the Commission proposes to enable itself to take decisions with binding commitments. However, given the fact that commitments resolve the Commission's objections as regards a certain agreement or practice, such decisions should clearly state that behaviour compliant with said commitments does not infringe Article 81 or 82 of the Treaty. These decisions should not be open to challenge before national authorities or courts, but effective and speedy judicial review to the Court of First Instance or Court of Justice should be available. Where commitments are not complied with, the Commission should be able to reopen proceedings also at the request of a directly concerned third party.

10 Finding of inapplicability (Article 10)

UNICE is pleased that the Commission proposes to retain the power to adopt negative decisions. However, UNICE is disappointed that the Commission intends to adopt such decisions only on its own initiative, for reasons of the Community public interest.

UNICE has always argued that 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 a competition authority or judge. The law is not always sufficiently clear for companies to be able to rely on self-assessment of their agreements and practices; in many instances positions are not clear-cut. Existing block exemption regulations do not provide a safe harbour for agreements that fall outside them, and understanding the accompanying guidelines can sometimes be difficult. UNICE therefore believes that the Commission's proposal unjustly ignores companies' legitimate needs in terms of legal predictability and possible fines.

In UNICE's view, as to certain agreements involving important investments or where the resolution of a novel issue of European competition law is at stake, the Commission should indicate in the

Regulation that, on request, it will issue a reasoned opinion or decision as regards the applicability of Article 81 or 82 to these agreements. UNICE strongly believes that lack of legal predictability in such instances would deter investment in the EU and expose companies to unacceptable risks. The Commission's proposal does not ensure an appropriate level of protection for such agreements and should be amended.

More specifically, UNICE considers that the Commission, when so requested, should issue a reasoned opinion or decision as regards the applicability of Article 81 or 82 to the following agreements:

-agreements which are ancillary to or involve a financial risk, capital investment, or an effect upon shareholder value, which is significant for the businesses directly concerned; or

-agreements which involve the resolution of a novel issue of EU competition law, or involve the application of EU competition law to a novel situation or to new or rapidly evolving markets.

UNICE believes that, in addition to providing essential legal predictability for such arrangements, the very existence of such limited possibility of reasoned opinions or decisions would positively influence coherence in the application of European competition policy. UNICE would like to point out that it is likely that companies will only address the Commission where the issues at stake are sufficiently significant for them to make the investment in time and cost to notify. It is thus unlikely that the Commission will be flooded with notifications.

11 Cooperation with national authorities (Article 11)

In Article 11 of the Proposal the Commission sets out reporting obligations and a clear rule that national competition authorities shall be relieved of their competence to apply Articles 81 and 82 when the Commission has initiated proceedings.

UNICE is disappointed that the Commission has not yet proposed clear, generally applicable rules for allocating cases between national authorities and the Commission. To avoid duplication of procedure and forum shopping, it is essential that investigations are carried out by a single authority ("one-stop shop") whose decision would have to be effective across the EU.

Multiple proceedings are extremely costly for businesses whose activities have an impact in several Member States. They will lead to a repetition of compliance checks with European competition law on the same activity in different Member States and multiple jeopardy. They increase the risk of conflicting decisions and generally are a waste of the resources of both companies and competition authorities.

In order to avoid such harmful multiple procedures and forum shopping, it is essential that a clear mechanism on the basis of generally applicable criteria for allocating cases between national authorities and the Commission is established. In addition, national decisions should attain Community-wide effect, for instance in the absence of appeal or opposition by the Commission or a Member State within a reasonably short period. UNICE urgently calls on the Member States and the Commission to devise and agree such rules.

As regards the obligation for the Commission to transmit copies of the most important documents it has collected, UNICE would prefer, to avoid misunderstandings, that the Commission clarifies that all documents should be transmitted on which it intends to base its decision.

Lastly, UNICE considers that EFTA countries should also be part of the network between the Commission and national authorities. Community competition law is of relevance to EFTA countries and they are implicated in cases which may affect trade between them and the Member States. It is therefore important that these countries are involved in the arrangements to promote consistency in application of the law.

12 Exchange of information (Article 12)

In Article 12 of the Proposal the Commission proposes to allow itself and national competition authorities to exchange and use all information, including confidential information, provided that it is used only for the purpose of applying European competition law.

UNICE welcomes the proposal that information may only be used for the purpose of applying European competition law but is worried about unrestricted information exchange. Rules as regards the protection of confidential information and sanctions for infringements differ amongst national competition authorities across the EU and it is important that appropriate safeguards are put in place. A company should know in advance when information exchange is proposed and have the opportunity to challenge such exchange before a judge, unless this would seriously hamper an investigation into a hard-core cartel. 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. Assurances should also be given that the information will be subject to conditions of confidentiality at least as stringent as those of the supplying jurisdiction.

13 Suspension of termination of proceedings (Article 13)

In view of the fact that checks should be carried out by a single authority ("one-stop-shop") to avoid multiple procedures, multiple jeopardy and forum shopping (see above), it is essential that competition authorities should be obliged to reject complaints against agreements or practices which have already been dealt with, or suspend proceedings before them if another authority is dealing with the case.

14 Cooperation with national courts (Article 15)

As stated above, UNICE doubts whether national courts in the EU can be relied upon to administer Article 81 as a whole. Decentralised application by national courts creates problems for uniform application that at present cannot be overcome. The Commission will be unable to compel national courts to adopt its assessment if they are unwilling so to do and it is not mandatory on the court to receive it. The Commission's proposal to be heard as an *amicus* to the court raises serious constitutional issues; national courts might consider it to be an infringement of their independence to have to allow the Commission to appear before them. In any case, when asked for their opinion, national authorities and the Commission should be obliged to react.

15 Uniform application of Community competition law (Article 16)

As stated above, it is essential that the outcome of procedures is the same throughout the EU and that a level playing-field is ensured. The integrity of the internal market should be maintained. National courts and national competition authorities should avoid conflicting decisions since they would be contrary to the general principle of legal certainty.

16 Powers of investigation (Chapter V)

The Commission proposes to give itself new investigating powers and extend old ones significantly. All necessary information has to be presented; private homes may be inspected and sealed; any employee may be interviewed and the employer be fined for their incomplete or false answers.

As a general point, UNICE fears that insufficient safeguards are put in place to counterbalance application of these far-reaching powers. Fairness and due process should be ensured and the rights of the defence, as a fundamental principle, must be observed. 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; the right to silence and the right against self-incrimination should thus be specifically enshrined in the Regulation. Interrogated persons should have the right to have a lawyer present during all phases of investigations and interrogations. The Commission should not be empowered to ask questions of employees, but only of appointed

representatives of the undertaking. If information is to be provided, it should be subject to proportionality and not constitute an undue burden on the company. Considering that infringements of European competition law are not considered criminal offences, it is excessive that a mere suspicion is proposed as sufficient ground to search and seal private homes (a novelty to European competition policy). Sealing premises or business records (*e.g* computers) seriously affects the company concerned and should not be undertaken without a time limit. Contrary to the Commission's proposal only to allow the Court of Justice to review the lawfulness of the Commission's decision ordering these inspections, UNICE considers that national courts should also be entitled to review the lawfulness of such decisions.

UNICE also calls on the Commission to change current rules whereby qualified in-house counsel is not granted legal privilege. When in-house legal counsel is properly qualified and complies with adequate rules of professional ethics and discipline, his valuable legal advice should be privileged. When consulting their own in-house lawyers, executives must be able to rely on their counsel's professional secrecy and should not be discouraged from consulting them because confidential deliberations risk being disclosed. Especially in a legal exception system, companies must be allowed to use in-house counsel to carry out "privileged" self-assessment.

17 Penalties (Chapter VI)

The power to impose fines for refusal to answer questions would be contrary to the right to silence and the right against self-incrimination which should be enshrined in the Regulation. In addition, UNICE believes it contrary to basic principles of fairness and natural justice for the Commission to be able to impose fines on member undertakings of an association. Such power could easily punish the innocent. UNICE notes that the Commission has great discretionary powers as regards the setting of fines. Maximum levels of penalties proposed are excessive and could lead to disproportionate levels of fines for procedural breaches of the rules. UNICE calls on the Commission to use its power to impose fines in accordance with basic principles of fairness and due process in order to avoid the Commission's power being brought into disrepute.

18 Hearings (Chapter VIII)

As stated above, UNICE is concerned about the lack of procedural safeguards in EU competition proceedings, where the Commission in fact acts as prosecutor, judge, and executioner. UNICE believes that, in anti-trust investigations, effective means of early judicial review of (procedural) decisions should be available if any party believes its rights have not been fully protected. The Commission should be more accountable and act in accordance with due process standards. The role of the hearing officer should be enhanced.

19 Review by the Court of Justice (Article 32)

Although UNICE is conscious of the fact that Article 229 of the Treaty refers to unlimited jurisdiction of the Court of Justice with regard to penalties, UNICE regrets that the Court of Justice shall only have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. UNICE would prefer it if the Court of Justice had unlimited jurisdiction to review all Commission decisions.

20 Transitional provisions (Article 35)

UNICE finds it unacceptable that applications and notifications made to the Commission under the old system shall lapse as from the date of application of the new Regulation and that all existing exemptions should come to an end once the new Regulation enters into force. This would be contrary to the principle of avoiding retroactive legislation and would also severely reduce legal certainty. UNICE therefore urges the Member States and the Commission to delete this provision.