6/6/1

5 December 2003

MODERNISATION OF EC COMPETITION LAW

Draft Commission Regulation relating to proceedings by the Commission pursuant to Articles 81 and 82

Draft Commission Notices and Guidelines regarding Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

UNICE COMMENTS

1. INTRODUCTION

Modernisation

Following the adoption at the end of 2002 of the revolutionary anti-trust reform to decentralise implementation of Community competition rules to national authorities and courts and replace the former one-stop shop exemption system centralised at Commission level, UNICE welcomes the Commission launching an extensive consultation exercise on several draft notices and a draft procedural regulation which work out details and provide guidance on certain important aspects of the new enforcement system for anti-competitive agreements and abuses of a dominant position.

UNICE has always stressed that it is very important that the new rules on decentralisation are implemented in a sensible way to avoid legal uncertainty for business, multiple control proceedings and forum-shopping. When any national competition authority and national judge may look at business agreements *ex post* there is a risk that there will be inconsistent decision-making and it is vital that the Commission ensures the integrity of the internal market by making interventions or taking control over a case. The Commission should also be prepared to issue guidance letters about the compatibility of agreements with Articles 81 and 82 if the parties so request, for example because there are large investments at stake or new legal questions are raised.

UNICE will elaborate further on these and other issues below.

2. MODERNISATION PACKAGE

1 National courts

UNICE has always had strong doubts about 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. Numerous tribunals throughout the Community will have to assess complex competition law issues, thereby augmenting the chance of conflicting and erroneous decision-making. UNICE fears that the Commission's draft notices, and especially the draft guidelines on the application of Article 81 (3), will not sufficiently resolve such concerns given the broad guidance and considerable discretion they give to national courts to decide whether agreements have likely anti-competitive effects and whether pro-competitive effects outweigh anti-competitive effects.

It is for this reason that UNICE continues to advocate that national law should allow national courts, which in the context of civil litigation are being confronted with a complicated issue of competition law requiring an in-depth economic analysis, to refer such cases for decision to a specialised court.

In any case, UNICE considers that national courts should be given very clear guidance regarding the tests to be applied for deciding whether an agreement falls within the scope of Article 81 (1). In particular, it should be made clearer, by means of examples, when restrictive clauses in an agreement do not bring the agreement within the scope of Article 81 (1) because the clauses concerned are objectively necessary to achieve the object of such agreements. It is important to avoid giving the impression that once an agreement is considered acceptable (because it is not a hard-core cartel arrangement and there is no market power involved) that, nevertheless, the individual clauses of the agreement still need to be assessed to determine whether a less restrictive agreement would have been concluded by undertakings at a similar setting.

Additionally, there is also a need for clearer guidance relating to the fact that an *ex post* assessment should, wherever appropriate, focus on the facts prevailing at the time of conclusion of the agreement. This should be done, not only when the agreement is an irreversible event, but also in other cases where the parties, at the time of concluding their agreement, have to be certain of its binding nature in view of the underlying calculation of risk, costs and benefits over time. Alternatively, there would be too much uncertainty for companies whose agreements were entirely acceptable at the time of conclusion. Such a clarification would also reduce the risk of divergent decision-making.

Lastly, UNICE suggests that the draft guidelines set out more clearly their relationship with the Guidelines on horizontal cooperation agreements and on vertical restraints. The Guidelines should also stress more predominantly that agreements falling outside the scope of the exemptions are not presumed to be infringing Article 81.

In order to enable stakeholders to closely follow decisions of national courts, UNICE further suggests that the Commission publishes the copies of written judgements of national courts it receives pursuant to Article 15 (2), for example, in a special section on the website of DG Competition.

2 The burden of proof

UNICE notes that the draft guidelines on the application of Article 81 (3) set out extensive requirements for substantiating efficiency claims, especially as regards the second condition of Article 81 para 3 (fair share for consumers). Notwithstanding the fact that UNICE continues to believe that it is for the public authority to demonstrate that a certain agreement 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, UNICE would welcome more guidance on the

standard of proof required for substantiating efficiency claims and the significance of market power in this context.

UNICE also notes that the draft guidelines elaborate extensively on the pass-on and balancing of cost efficiencies compared to the pass-on and balancing of other types of efficiencies (new products, etc.). It would welcome more guidance on non-cost efficiencies considering that, as the guidelines say, the availability of new and improved products constitutes an important source of consumer welfare but may be difficult to value. Generally, UNICE finds that the guidance on quantifying consumer gains relies too much on monetary valuation techniques, which aim to apply mathematical precision to concepts which are not always appropriately measured and valued in such terms.

Lastly, UNICE notes that it seems very difficult for a defending party to prove that the agreement does not amount to an abuse of a dominant position, as set out in the section regarding the fourth condition of Article 81 (3).

3 Relationship between Articles 81 and 82 and national laws

UNICE would have preferred a clear requirement in Regulation 1/2003 that Community competition law is to apply to the exclusion of national competition laws in cases where trade between Member States may be affected instead of the present rule which allows national competition authorities and courts to apply national competition law provided this does not lead to prohibition when there is no restriction of competition within the meaning of Article 81 (1) or when the conditions of Article 81 (3) are fulfilled. UNICE regrets that national competition authorities and courts can still prohibit practices that are allowed under Community competition law because they do not constitute an abuse of a dominant position within the meaning of Article 82 or because national provisions predominantly pursue an objective different from that pursued by Articles 81 and 82.

In UNICE's view, 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 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. Considering the importance of the 'effect on trade' concept for minimising such risks, UNICE is pleased that the draft Notice on this topic provides ample guidance on the question of when trade between Member States may be affected. UNICE fully supports the general principles set out in the draft Notice.

However, having said this, UNICE notes that clear Commission guidance regarding the scope of Article 82 and its delimitation with the concept of unfair commercial practices is still missing.

4 Principles of allocation and consistent application

The draft Notice on cooperation within the Network of Competition Authorities sets out principles for allocating cases between national authorities and the Commission and mechanisms of cooperation to ensure consistent decision-making.

Multiple proceedings should be avoided considering that they are extremely costly for businesses whose activities have an impact in several Member States. They would lead to a repetition of compliance checks with European competition law on the same activity in different Member States and multiple jeopardy. They would increase the risk of

conflicting decisions and generally be a waste of the resources of both companies and competition authorities. In order to avoid such harmful procedures and reduce risks of 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. For this reason, UNICE considers the Notice on cooperation within the Network highly important and urges the Commission and Member States to abide by its principles in spite of the voluntary nature of the rules. It regrets though that the draft Notice does not explicitly discourage parallel action by two or three national authorities. As stated above, such proceedings are harmful and costly. It is therefore essential that competition authorities should reject complaints against agreements or practices which have already been dealt with, or suspend proceedings if another authority is dealing with the case.

In addition, the Notice should provide for mechanisms that would give national decisions some form of Community-wide effect, for instance in the absence of 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 principles.

As regards the Commission's responsibility to ensure consistent decision-making, UNICE supports the Commission to initiate proceedings which relieve national authorities of their competence to apply Articles 81 and 82 when one or more authorities envisage taking conflicting decisions; when a national authority envisages a decision which is obviously in conflict with the case law of the Court and previous decisions and regulations of the Commission; when a national authority unduly draws out proceedings; and when there is a need to adopt a Commission decision to develop Community competition policy. Such interventions are essential for maintaining the integrity of the single market and would, together with national courts only deciding in clear-cut cases as described above, help manage the risks of decentralisation as identified by the business community and others.

5 Exchange of information, legal privilege, rights of the defence, and leniency

UNICE welcomes the requirement 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 additional safeguards are put in place to those set out in the draft Notice on cooperation within the Network of Competition Authorities. 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.

Pleased with the recent Order in joint Cases T125/03R and T253/03R of 31 October 2003 (Akzo Nobel Chemicals), UNICE 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 legal advice and its underlying work-product 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. This would also create a level playing-field across the EU in this respect, considering that several Member States do recognise the right of executives to rely on their in-house counsel's professional secrecy.

In relation to investigations by the Commission and the power to take statements and ask questions to any employee, UNICE strongly believes that the rights of the defence, as a fundamental principle, must be observed and laid down in the procedural Regulation. The right to silence and the right against self-incrimination should thus be specifically enshrined in the Regulation. Also, interrogated persons should have the right to have a lawyer of their choice present during all phases of investigations and interrogations.

As regards the issue of leniency, UNICE regrets that an application for leniency to a given authority is not to be considered as an application for leniency to any other authority. It is very difficult for companies to apply for leniency simultaneously to all competition authorities having competence to apply Article 81 in a territory which is affected by an infringement. UNICE fears that this may seriously hamper investigations of cartel infringements.

Although appreciating the Commission's and Member States' efforts to minimise this risk by committing themselves not to transmit or use information for the purpose of an investigation or imposing sanctions which has been voluntary submitted by a leniency applicant in case the applicant has not given its consent to the transmission of information to other members of the Network, UNICE fears that this is not enough. Considering the importance of timing in different leniency programmes, UNICE urges the Commission and the Member States to agree that the time of an application accepted by one national competition authority would also be considered as the time of application to other authorities that accepted the application in the same case within a short period of time (*e.g.* four weeks). This would resolve the problem of companies having to instruct different teams of lawyers to submit applications to different authorities simultaneously. In such a system, at least the problem of timing will be resolved, whilst letting the other requirements for a valid leniency application continue to depend on the rules of the different national programmes.

6. Guidance letters

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. Furthermore, as stated above, at present there are no clear guidelines as to how, in an *ex post* assessment, due regard should be given by national competition authorities and courts to the *bonafide* intentions and needs companies had at the time of conclusion of the agreement. UNICE therefore welcomes the Commission's intention to provide informal guidance relating to novel questions concerning Articles 81 and 82 that arise in individual cases, however it believes that the principles set out in the draft Notice on this topic do not ensure an appropriate level of protection and should be amended.

In UNICE's view, the Commission, when so requested, should *always* issue a guidance letter 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 guidance 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 and it is thus unlikely that the Commission will be flooded with requests.