UNICE
THE VOICE OF BUSINESS IN EUROPE

6/36/1 8 October 2002

MODERNISATION OF EC COMPETITION LAW

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

Status: 26 July 2002

UNICE SUPPLEMENTARY COMMENTS

1. INTRODUCTION

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.

On 2 March 2001, UNICE issued comments on the proposal for a Regulation in which it called on the Member States and the Commission to devise and insist on solutions to manage the risk of divergent decision-making, multiple proceedings and jeopardy, forum-shopping, and harmful uncertainty. Ever since, the Member States and the Commission have been studying and discussing the proposal in great depth and at considerable length. The outcome of these discussions and the solutions that are devised and agreed so far are worrying and resolve only to a very limited extent concerns expressed by the business community. It is for this reason that UNICE once again wishes to take position on some outstanding issues that are of primary importance for business.

2. 26 JULY 2002 VERSION OF THE PROPOSAL FOR A COUNCIL REGULATION

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

UNICE regrets that it is no longer proposed in Article 3 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 potentially different national competition laws of several Member States is no longer acceptable for business and would greatly increase the risk of re-nationalisation of competition law at the expense of the integrity of the single market.

The amended proposal which would allow 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, does not adequately resolve this concern especially since national 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 merger control laws are applied or national provisions that predominantly pursue an objective different than that pursued by Articles 81 and 82. Considering the latter proposal, UNICE would welcome a clarification in recital 8a that the objective of Articles 81 and 82 is not the protection of competitors but the efficient working of competition.

2 *Registration of agreements (Article 4)*

UNICE is concerned about the proposal 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.

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. 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 (Article 10), 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.

3 *Uniform application of Community competition law (Article 16)*

It is essential that the outcome of procedures is the same throughout the EU and that a level playing-field is ensured. National courts and national competition authorities should avoid decisions that conflict with decisions adopted by the Commission since this would seriously undermine legal certainty.

UNICE considers it of utmost importance that the Regulation lays down a clear and indisputable rule which would manifestly oblige national competition authorities and courts, when ruling on agreements or practices which are already the subject of a Commission proceeding or decision, not to take decisions which would run counter to the decisions adopted (or envisaged) by the Commission. The principle of uniform application is key to modernisation and such a provision would render the principle transparent and incontestable.

4 Powers of investigation (Chapter V)

The Commission may get new investigating powers and extend old ones significantly. All necessary information has to be presented; private homes may be inspected; business premises and books or records can be sealed; any employee may be interviewed and the employer be fined for their incorrect, incomplete or misleading 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 legislator should recognise a high standard of fundamental right protection which is laid down in the Regulation. It is insufficient that Article 18 (3) now states that an undertaking cannot be forced to admit that it has committed an infringement; the Commission should also not have the power to oblige employees to provide it with answers which might involve admitting the existence of an infringement by their employer. The right to silence and the right against self-incrimination should thus be specifically enshrined in the Regulation and not only in relation to undertakings (Article 18) but also as regards representatives and members of staff (Article 20). Otherwise these rights would be restricted to an unacceptable extent. Also, interrogated persons should have the right to have a lawyer of their choice present during all phases of investigations and interrogations. As a matter of principle, the

Commission should not be empowered to ask questions of any member of staff, 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. There should be some qualification, such as a time limit, proportionate to the information requested.

In Article 19, it is proposed to grant the Commission the power to take statements through interviewing any natural or legal person who consents to be interviewed. It is not clear what is meant by 'interview' and how it relates to Article 20 (2) (e). It should be made clear that an individual cannot be compelled to attend an interview and that lack of consent does not amount to a failure to co-operate which could be subject to penalties.

Considering that infringements of European competition law are not considered criminal offences, it is excessive that a reasonable suspicion is proposed as sufficient ground to search 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. Most companies are entirely dependent on the continuous operation of their IT systems and could not afford to have them sealed off for even a very short period of time.

UNICE also considers that current rules whereby qualified in-house counsel is not granted legal privilege should be changed. 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.

5 *Fines (Article 22)*

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 (see above). In addition, UNICE is very concerned about amendments to para 4 which would make undertakings whose representatives were members of the decision-making bodies of an association of undertakings liable for imposed fines.

According to the amended Article 22 (4) an association of undertakings would be obliged to call for contributions from its members to cover the amount of a fine which is imposed on it. Where such contributions have not been made to the association within a time limit fixed by the Commission, the Commission may require payment of the fine directly by any of the undertakings whose representatives were members of the decision-making bodies of the association.

UNICE is surprised that, suddenly, being a member of the decision-making body of an association would make the undertaking which employs the member liable for infringements it may not have had anything to do with. An option which would allow undertakings to escape liability if they demonstrate that they have not implemented the illegal decision and either were not aware of it or have actively opposed it, does not provide much relief considering how difficult it is to deliver negative proof of not having been aware of something. Companies cannot be expected to check all recommendations and information received from an association from a competition law point of view.

These proposals risk undermining national principles and practices in the field of making employees and companies liable and on how to apportion the burden of proof. The issue of employee/employer liability is addressed in national law through sophisticated legal techniques and usually judges only hold employees liable when it transpires that the employee was greatly negligent and only under specific conditions is the employer-undertaking held liable for such behaviour. The fact that now it is proposed not only to make it very easy to make underlying and member undertakings liable but also to reverse the burden of proof (which will make it effectively very difficult for the undertaking concerned to prove its innocence) could easily lead to disproportionate and unreasonable results. The proposal covers matters that should be left to the Member States' civil law systems and is not an issue for piecemeal regulation in competition legislation.

UNICE strongly believes that it is 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.

6 Transitional provisions (Article 35)

Lastly, 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 no later than two years from the date of application of the new Regulation. This would be contrary to the principle of avoiding retroactive legislation and would also severely reduce legal certainty.

7 Other issues

UNICE notes that other concerns expressed by the business community also remain essentially unsolved. Especially the proposals related to the issue of the burden of proof (Article 2), exchange of information (Article 12), structural remedies (Article 7); and the adoption of negative decisions (Article 10) need to be reworked and clarified. In this context, UNICE refers to its 2 March 2001 comments in which it put forward solutions for these issues which would help to manage the risk of divergent decision-making, harmful uncertainty and significant increases in burdens on business linked to the modernization proposals whilst respecting fundamental rights and due process standards.

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