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REPORT

on the proposal for a Council regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87
(COM(2000) 582 – C5-0527/2000 – 2000/0243(CNS))

Committee on Economic and Monetary Affairs

Rapporteur: Jonathan Evans

Symbols for procedures

- * Consultation procedure
majority of the votes cast
- **I Cooperation procedure (first reading)
majority of the votes cast
- **II Cooperation procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- *** Assent procedure
*majority of Parliament's component Members except in cases
covered by Articles 105, 107, 161 and 300 of the EC Treaty and
Article 7 of the EU Treaty*
- ***I Codecision procedure (first reading)
majority of the votes cast
- ***II Codecision procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- ***III Codecision procedure (third reading)
majority of the votes cast, to approve the joint text

(The type of procedure depends on the legal basis proposed by the Commission)

Amendments to a legislative text

In amendments by Parliament, amended text is highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). These suggested corrections are subject to the agreement of the departments concerned.

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PROCEDURAL PAGE

By letter of 18 October 2000 the Council consulted Parliament, pursuant to Article 83 of the EC Treaty, on the (amended) proposal for a Council regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 (COM(2000) 582 - 2000/0243 (CNS)).

At the sitting of 23 October 2000 the President of Parliament announced that she had referred this proposal to the Committee on Economic and Monetary Affairs as the committee responsible and the Committee on Industry, External Trade, Research and Energy and the Committee on Legal Affairs and the Internal Market for their opinions (C5-0527/2000).

The Committee on Economic and Monetary Affairs appointed Jonathan Evans rapporteur at its meeting of 6 November 2000.

The committee considered the Commission proposal and draft report at its meetings of 21 November 2000, 27 February, 25 April and 20 June 2001.

At the last meeting it adopted the draft legislative resolution by 20 votes to 1, with 10 abstentions.

The following were present for the vote: Christa Randzio-Plath, chairwoman, José Manuel García-Margallo y Marfil and Philippe A.R. Herzog, vice-chairmen, Jonathan Evans, rapporteur, Generoso Andria, Luis Berenguer Fuster, Pervenche Berès, Hans Blokland, Hans Udo Bullmann, Benedetto Della Vedova, Harald Ettl (for Richard A. Balfe), Carles-Alfred Gasòliba i Böhm, Marie-Hélène Gillig (for Simon Francis Murphy), Robert Goebbels, Lisbeth Grönfeldt Bergman, Giorgos Katiforis, Piia-Noora Kauppi, Christoph Werner Konrad, Werner Langen (for Othmar Karas), Jules Maaten (for Christopher Huhne), Thomas Mann (for Brice Hortefeux), Ioannis Marinos, Peter Michael Mombaur (for Astrid Lulling), Alexander Radwan, Bernhard Rapkay, Christian Foldberg Røvsing (for José Javier Pomés Ruiz), Olle Schmidt, Charles Tannock, Marianne L.P. Thyssen, Theresa Villiers and Karl von Wogau .

The opinions of the Committee on Industry, External Trade, Research and Energy and the Committee on Legal Affairs and the Internal Market are attached

The report was tabled on 21 June 2001.

The deadline for tabling amendments will be indicated in the draft agenda for the relevant part-session.

LEGISLATIVE PROPOSAL

Proposal for a Council regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 (COM(2000) 582 – C5-0527/2000 – 2000/0243(CNS))

The proposal is amended as follows:

Text proposed by the Commission ⁽¹⁾

Amendments by Parliament

Amendment 1

Recital 8

(8) In order to ensure that the same competition rules apply to businesses throughout the Community, provision must be made pursuant to Article 83(2)(e) to regulate the relationship between Articles 81 and 82 and national competition law by excluding the application of national law to agreements, decisions and practices within the scope of Articles 81 and 82.

(8) In order to ensure that the same competition rules apply to businesses throughout the Community **and provide legal certainty for individual legal persons**, provision must be made pursuant to Article 83(2)(e) to regulate the relationship between Articles 81 and 82 and national competition law by excluding the application of national law to agreements, decisions and practices within the scope of Articles 81 and 82.

Justification

The addition clarifies the aim of ensuring, by including the Member States' authorities and courts, that legal fragmentation does not increase but rather that acceptance of Community law improves, thus strengthening legal certainty for market operators in the individual Member States in relation to practice in all the other Member States.

Amendment 2

Recital 18

(18) Consistency in the application of the competition rules also **requires** that arrangements be established for cooperation between the courts of the Member States and the Commission. In particular, it will be

(18) Consistency in the application of the competition rules **and the need to safeguard legal certainty for legal persons** also **require** that arrangements be established for cooperation between the courts of the

⁽¹⁾ OJ C 365 E, 19.12.2000, p. 284

useful to allow national courts to ask the Commission for information or for its opinion on points concerning the application of Community competition law. The Commission and the competition authorities of the Member States must also be able to submit written or oral observations to courts called upon to apply Article 81 or Article 82. Steps must therefore be taken to ensure that the Commission and the competition authorities of the Member States are kept sufficiently well informed of proceedings before national courts.

Member States and the Commission. In particular, it will be useful to allow national courts to ask the Commission for information or for its opinion on points concerning the application of Community competition law. The Commission and the competition authorities of the Member States must also be able to submit written or oral observations to courts called upon to apply Article 81 or Article 82. Steps must therefore be taken to ensure that the Commission and the competition authorities of the Member States are kept sufficiently well informed of proceedings before national courts.

Justification

The addition clarifies the aim of ensuring, by including the Member States' authorities and courts, that legal fragmentation does not increase but rather that acceptance of Community law improves, thus strengthening legal certainty for market operators in the individual Member States in relation to practice in all the other Member States.

Amendment 3

ARTICLE 4

Powers of the Commission

1. For the purpose of applying Articles 81 and 82 of the Treaty, the Commission shall have the powers provided for by this Regulation.

1. For the purpose of applying Articles 81 and 82 of the Treaty, the Commission shall have the powers provided for by this Regulation.

2. The Commission may, by regulation, determine types of agreements, decisions of associations of undertakings and concerted practices caught by Article 81(1) of the Treaty which must be registered by undertakings. In that event, it shall also determine the procedures for such registration and the penalties applicable in the event of failure to comply with the obligation. Registration of an agreement, a

Delete

decision of an association or a concerted practice shall confer no entitlement on the registering undertakings or associations of undertakings and shall not form an obstacle to the application of this Regulation.

Justification

The value of the proposed new registration system has not been satisfactorily established.

Amendment 4 Article 5

The competition authorities of the Member States shall have the power in individual cases to apply the prohibition in Article 81(1) of the Treaty where the conditions of Article 81(3) are not fulfilled, and the prohibition in Article 82. For this purpose, acting on their own initiative or on a complaint, they may take any decision requiring that an infringement be brought to an end, adopting interim measures, accepting commitments or imposing fines, periodic penalty payments or any other penalty provided for ***in their national law***. Where on the basis of the information in their possession the conditions for prohibition are not met, they may likewise decide that there are no grounds for action on their part.

The competition authorities of the Member States shall have the power in individual cases to apply the prohibition in Article 81(1) of the Treaty where the conditions of Article 81(3) are not fulfilled, and the prohibition in Article 82. For this purpose, acting on their own initiative or on a complaint, they may take any decision requiring that an infringement be brought to an end, adopting interim measures, accepting commitments or imposing fines ***in accordance with Article 22***, periodic penalty payments ***in accordance with Article 23*** or any other penalty provided for in ***European competition law, provided that such penalty is proportionate and in accordance with the general principles of Community law***. Where on the basis of the information in their possession the conditions for prohibition are not met, they may likewise decide that there are no grounds for action on their part.

Justification

It is essential to ensure uniformity in the application of Community law, also as regards the imposition of fines, periodic penalty payments and other penalties, in order, inter alia, to avoid forum shopping. The sanctions imposed under national competition laws may vary

considerably between member states. Under an EU wide application of competition law, it is important that the form and level of sanctions for breaches are harmonised.

Amendment 5
Article 7 paragraph 1
Finding and termination of infringement

1. Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 or of Article 82 of the Treaty it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any obligations ***necessary, including remedies of a structural nature***. If it has a legitimate interest in doing so, it may also find that an infringement has been committed in the past.

1. Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 or of Article 82 of the Treaty it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any obligations ***including remedies of a behavioural or structural nature, which are proportionate and necessary to bring the infringement effectively to an end***. If it has a legitimate interest in doing so, it may also find that an infringement has been committed in the past.

Justification

The measures available to the Commission to bring infringements to an end should be sufficient to uphold anti-cartel action.

Amendment 6
Article 8, paragraph 2

A decision under paragraph 1 shall apply for a maximum of one year but shall be renewable.

A decision under paragraph 1 shall apply for a maximum of one year but shall be renewable, ***in so far as this is necessary and appropriate***.

Justification

This proposal needs to be clarified, particularly since the measure in question is a temporary one.

Amendment 7
Article 10

For reasons of the Community public interest, the Commission, acting on its own initiative, may by decision find that, on the basis of the information in its possession, Article 81 of the Treaty is not applicable to an agreement, a decision of an association of undertakings or a concerted practice, either because the conditions of Article 81(1) are not fulfilled, or because the conditions of Article 81(3) are satisfied.

The Commission may likewise make such a finding with reference to Article 82 of the Treaty.

For reasons of the Community public interest, the Commission, acting on its own initiative, may by decision find that, on the basis of the information in its possession, Article 81 of the Treaty is not applicable to an agreement, a decision of an association of undertakings or a concerted practice, either because the conditions of Article 81(1) are not fulfilled, or because the conditions of Article 81(3) are satisfied.

The Commission may likewise make such a finding with reference to Article 82 of the Treaty.

In assessing the Community public interest, the Commission may apply this article in particular to any agreement having an effect on trade between Member States and which

(a) is ancillary to or involves a significant financial risk or capital investment or

(b) involves the resolution of a novel issue of European Competition law or involves the application of such law to a novel situation.

2. When the Commission has issued a decision to the effect that Article 81(1) of the Treaty is not applicable, that decision shall be binding on the Member States.

Justification

“The community public interest” needs to be better defined in order to increase legal certainty. *This important power should not be limited solely to cases undertaken under the Commission’s own initiative. In order to preserve legal certainty, it is necessary that some policy guidance should be available from the Commission in the limited circumstances proposed.*

Amendment 8

Article 11

Cooperation between the Commission and the competition authorities of the Member States

1. The Commission and the competition authorities of the Member States shall apply the Community competition rules in close cooperation.

2. The Commission shall forthwith transmit to the competition authorities of the Member States copies of *the most important* documents it has collected with a view to applying Articles 7 to 10.

3. Where a matter involving the application of Article 81 or Article 82 of the Treaty is referred to the competition authorities of the Member States or where they act on their own initiative to apply those Articles, they shall inform the Commission accordingly at the outset of their own proceedings.

4. Where competition authorities of Member States intend to adopt a decision under Article 81 or Article 82 of the Treaty requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption regulation, they shall first consult the Commission. For that purpose, they shall no later than one month before adopting the decision provide the Commission with a summary of the case and with copies of *the most important* documents drawn up in the course of their own proceedings. At the Commission's request, they shall provide it with a copy of any other document relating to the case.

5. The competition authorities of the Member States may consult the Commission on any other case involving the application of Community law.

6. The initiation by the Commission of proceedings for the adoption of a decision under this Regulation shall relieve the competition authorities of the Member States of their competence to apply

1. The Commission and the competition authorities of the Member States shall apply the Community competition rules in close cooperation.

2. The Commission shall forthwith transmit to the competition authorities of the Member States copies of *all of the necessary* documents it has collected with a view to applying Articles 7 to 10.

3. Where a matter involving the application of Article 81 or Article 82 of the Treaty is referred to the competition authorities of the Member States or where they act on their own initiative to apply those Articles, they shall inform the Commission accordingly at the outset of their own proceedings.

4. Where competition authorities of Member States intend to adopt a decision under Article 81 or Article 82 of the Treaty requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption regulation, they shall first consult the Commission. For that purpose, they shall no later than one month before adopting the decision provide the Commission with a summary of the case and with copies of *all of the necessary* documents drawn up in the course of their own proceedings. At the Commission's request, they shall provide it with a copy of any other document relating to the case.

5. The competition authorities of the Member States may consult the Commission on any other case involving the application of Community law.

6. The initiation by the Commission of proceedings for the adoption of a decision under this Regulation shall relieve the competition authorities of the Member States of their competence to apply

Justification

In order to ensure the consistent application of competition law it is important that the national authorities and the Commission have all the necessary documents at their disposal before adopting a decision. The exchange of information between the Commission and the competition authorities of the Member States is essential for the smooth operation of the new system proposed by the Commission.

Amendment 9

Article 14, paragraph 2

2. The Advisory Committee shall be composed of representatives of the competition authorities of the Member States. Each Member State shall appoint a representative who, if prevented from attending, may be replaced by another representative.

2. The Advisory Committee shall be composed of representatives of the competition authorities of the Member States ***responsible for settling the cases***. Each Member State shall appoint a representative who, if prevented from attending, may be replaced by another representative.

Justification

When there are two competition authorities in a Member State, one responsible for examination and the other for settlement of the case, the latter should be the one represented on the Advisory Committee.

Amendment 10

Article 14 (3) a (new)

3a. Communications between a client and outside or in-house counsel containing or seeking legal advice shall be privileged provided that the legal counsel is properly qualified and complies with adequate rules of professional ethics and discipline, which are laid down and enforced in the general interest by the professional associations to which the legal counsel belongs.

Justification

Legal privilege for in-house counsel exists already before the national competition authorities in several Member States. This creates inequality in the Union, which will become even more problematic in the light of the exchange of confidential information that is expected according to the new enforcement system.

Amendment 11
Article 14, paragraph 5

5. The opinion of the Advisory Committee shall be delivered in writing and appended to the draft decision. ***The Advisory Committee may recommend publication of the opinion. The Commission may carry out such publication. The decision to publish*** shall take account of the legitimate interest of undertakings in the protection of their business secrets.

5. The opinion of the Advisory Committee shall be delivered in writing and appended to the draft decision ***and made public. Publication*** shall take account of the legitimate interest of undertakings in the protection of their business secrets.

Justification

To increase transparency.

Amendment 12
ARTICLE 15 paragraph 3
Cooperation with national courts

3. For reasons of the Community public interest, the Commission may, ***on its own initiative***, submit written or oral observations to courts of the Member States on the subject of proceedings in which questions concerning the application of Article 81 or Article 82 of the Treaty arise. It may have itself represented by competition authorities of Member States. ***Acting on their own initiative***, competition authorities of Member States may likewise submit written or oral observations to the national courts of their Member State.

3. For reasons of the Community public interest, the Commission may submit written or oral observations to courts of the Member States on the subject of proceedings in which questions concerning the application of Article 81 or Article 82 of the Treaty arise. It may have itself represented by competition authorities of Member States. Competition authorities of Member States may likewise submit written or oral observations to the national courts of their Member State.

To this end, the Commission and the

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competition authorities of the Member States may request the national courts to transmit to them any documents necessary.

States may request the national courts to transmit to them any documents necessary.

Justification

The Commission's proposal would be an unnecessary and unwarranted intrusion in the judicial processes of national courts.

Amendment 13

Article 16

Uniform application of Community competition law

In accordance with Article 10 of the Treaty and the principle of the uniform application of Community law, national courts and the competition authorities of the Member States shall ***use every effort to*** avoid any decision that conflicts with decisions adopted by the Commission.

In accordance with Article 10 of the Treaty and the principle of the uniform application of Community law, national courts and the competition authorities of the Member States shall avoid any decision that conflicts with decisions adopted by the Commission.

Justification

If the Commission has reached a decision on a case, then national courts and competition authorities should follow that decision

Amendment 14

Article 20, paragraph 2, subparagraph f

to ask any representative ***or member of staff*** of the undertaking or association of undertakings for information relating to the subject-matter and purpose of the inspection and to record the answers.

to ask any representative of the undertaking or association of undertakings for information relating to the subject-matter and purpose of the inspection and to record the answers.

Justification

The question is whether the proposed right to interview workers would not put serious pressure on individual labour relations between employer and employee. It might even result

in pressure being put on the worker's position and further career opportunities . It makes more sense not to make any statements here about individual workers until such time as adequate protection measures for such workers have been decided on. It is therefore more sensible to restrict this article to representatives of the undertaking or association of undertakings in question.

Amendment 15

Article 22, paragraph 1, introductory phrase

1. The Commission may by decision impose on undertakings and associations of undertakings fines not exceeding 1 % of the total turnover in the preceding business year where, intentionally or negligently:

1. The Commission ***or a national competition authority*** may by decision impose on undertakings and associations of undertakings fines not exceeding 1 % of the total turnover in the preceding business year where, intentionally or negligently:

Justification

To promote uniformity of penalties.

Amendment 16

Article 22, paragraph 2

2. The Commission may by decision impose on undertakings and associations of undertakings fines not exceeding 10 % of the total turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently:

2. The Commission ***or a national competition authority*** may by decision impose on undertakings and associations of undertakings fines not exceeding 10 % of the total turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently:

Justification

To promote uniformity of penalties.

Amendment 17

Article 22, paragraph 4

4. Where a fine is imposed on an association of undertakings under this Regulation and the association is not solvent, the Commission may require payment of the fine by **any of** the undertakings which were members of the association **at the time the infringement was committed**. The amount required to be paid by each individual member cannot exceed 10% of its total turnover in the preceding business year.

4. Where a fine is imposed on an association of undertakings under this Regulation and the association is not solvent, the Commission may require payment of the fine **jointly and severally** by the undertakings which were members of the association **when the duty to prevent infringement failed to be fulfilled**. The amount required to be paid by each individual member cannot exceed 10% of its total turnover in the preceding business year.

Justification

Improves the system of subsidiary liability.

Amendment 18

Article 23, paragraph 1, introductory phrase

1. The Commission may, by decision, impose on undertakings or associations of undertakings periodic penalty payments not exceeding 5 % of the average daily turnover in the preceding business year per day and calculated from the date appointed by the decision, in order to compel them:

1. The Commission **or a national competition authority** may, by decision, impose on undertakings or associations of undertakings periodic penalty payments not exceeding 5 % of the average daily turnover in the preceding business year per day and calculated from the date appointed by the decision, in order to compel them:

Justification

To promote uniformity of penalties.

Amendment 19

Article 23, paragraph 2

2. Where the undertakings or associations of undertakings have satisfied the obligation which the periodic penalty payment was intended to enforce, the Commission may fix the definitive amount of the periodic penalty payment at a figure lower than that

2. Where the undertakings or associations of undertakings have satisfied the obligation which the periodic penalty payment was intended to enforce, the Commission **or the national competition authority, as the case may be**, may fix the definitive amount of the

which would arise under the original decision. Article 22(4) shall apply by analogy.

periodic penalty payment at a figure lower than that which would arise under the original decision. Article 22(4) shall apply by analogy.

Justification

To promote uniformity of penalties.

Amendment 20
Article 28, paragraph 3a (new)

3a. The Commission may also adopt implementing guidelines to clarify the rules in the exempting regulations.

Justification

There must be provision for adopting guidelines with the same consultative procedures as the regulations.

Amendment 21
Article 28, paragraph 4

4. Before adopting an exemption regulation, the Commission must publish a draft thereof and invite all interested parties concerned to submit their comments within the time-limit it lays down, which may not be less than one month.

4. Before adopting an exemption regulation ***or guidelines***, the Commission must publish a draft thereof and invite all interested parties concerned to submit their comments within the time-limit it lays down, which may not be less than one month.

Justification

There must be provision for adopting guidelines with the same consultative procedures as the regulations.

Amendment 22
Article 28, paragraph 5

5. Before publishing a draft exemption regulation and before adopting such a regulation, the Commission shall consult the Advisory Committee on

5. Before publishing a draft exemption regulation and before adopting such a regulation, the Commission shall consult the Advisory Committee on

Restrictive Practices and Dominant Positions.

Restrictive Practices and Dominant Positions. ***The same consultation shall take place in the event of publication of guidelines.***

Justification

There must be provision for adopting guidelines with the same consultative procedures as the regulations.

Amendment 23

ARTICLE 34, paragraph (a)
Implementing provisions

The Commission shall be authorised to take such measures as may be appropriate in order to apply this Regulation. The measures may concern inter alia:

The Commission shall be authorised to take such measures as may be appropriate in order to apply this Regulation. The measures may concern inter alia:

(a) the introduction of a registration requirement for certain types of agreement;

(paragraph (a) deleted)

Justification

See justification to amendment 3

Amendment 24
ARTICLE 35 paragraph 1
Transitional provisions

The validity of decisions applying Article 81(3) of the Treaty adopted by the Commission under those Regulations shall come to an end no later than the date of application of this Regulation.

The validity of decisions applying Article 81(3) of the Treaty adopted by the Commission under those Regulations shall come to an end ***no later than two years from*** the date of application of this Regulation.

Justification

It is undesirable and impractical to expect that currently approved agreements should become immediately challengeable. A limited transitional period will allow for an orderly introduction to the new regulatory structure.

Amendment 25
Article 36 a (new)

Report on the application of the present regulation

After a period of three years from the entry into force of the regulation, the Commission shall submit a report in which it analyses the ability of the national courts and authorities to apply the provisions of the present regulation. In the report the Commission shall propose measures aimed at improving training in Community competition law, access to the necessary information and the consistency of the application of Community competition law.

Justification

In order to ensure the smooth operation of the new system it is essential to check – following an initial period of application – whether the national authorities and courts have all the necessary means available to them for performing the tasks conferred on them by the present regulation and to identify measures aimed at facilitating their work.

Amendment 26
Article 41a (new)

The operation of this Regulation shall be subject to regular review and, in particular, a special annual report on its operation shall be submitted to the Council and the European Parliament for the first time on [eighteen months after the date for its first application].

Justification

Self-explanatory.

DRAFT LEGISLATIVE RESOLUTION

European Parliament legislative resolution on the proposal for a Council regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 (COM(2000) 582 – C5-0527/2000 – 2000/0243(CNS))

(Consultation procedure)

The European Parliament,

- having regard to the Commission proposal to the Council (COM(2000) 582¹),
 - having been consulted by the Council pursuant to Article 83 of the Treaty (C5-0527/2000),
 - having regard to Rule 67 of its Rules of Procedure,
 - having regard to the report of the Committee on Economic and Monetary Affairs and the opinions of the Committee on Industry, External Trade, Research and Energy and the Committee on Legal Affairs and the Internal Market (A5-0229/2001),
1. Approves the Commission proposal as amended;
 2. Calls on the Commission to alter its proposal accordingly, pursuant to Article 250(2) of the EC Treaty;
 3. Calls on the Council to notify Parliament should it intend to depart from the text approved by Parliament;
 4. Asks to be consulted again if the Council intends to amend the Commission proposal substantially;
 5. Instructs its President to forward its position to the Council and Commission.

¹ OJ C 365 E, 19.12.2000, p. 284

EXPLANATORY STATEMENT

Background

The current system of European competition rules dates back to the founding Treaty in 1957, which stipulated that competition within the internal market had to be protected from distortions and that the economic policy of the Community was committed to the principle of an open market economy with free competition. Article 81 of the Treaty sets out the competition rules applicable to restrictive agreements, decisions and concerted practices while Article 82 relates to abuses of dominant positions.

The implementing rules for the application of Articles 81 and 82 were drawn up in 1962 in Regulation 17, which has been applied with little modification ever since. The Regulation gave the Commission, national competition authorities and national courts the right to apply Article 81(1) directly (i.e. agreements between undertakings that restrict competition are in principle prohibited). The implementing rules however reserved the right of application of Article 81(3) exclusively to the Commission (i.e. the right to an exemption from Article 81(1)) after prior notification of the agreement. The Commission, national competition authorities and national courts enforced Article 82 in parallel.

This centralised system of notification and authorisation worked well in a Community of six member states but in an enlarged Community with a new global economic environment, there is general agreement that the continued application of Regulation 17 in its current format is no longer consistent with the effective supervision of competition. In view of further enlargement of the Community to 25 or more member states, reform of the current system is all the more urgent.

The Commission published a White Paper on reform in 1999. The European Parliament approved the Commission's reform proposals but outlined its concerns on the issues of legal certainty and the uniform application of EU competition law.

On 27 September 2000, the European Commission published its proposals for a new Council Regulation. In its proposals the Commission outlines its principal aims which are to provide more efficient protection of competition by refocusing Commission action on enforcement, to create a more level playing field and more consistent application of Community competition law while ensuring an adequate level of certainty for companies and reducing the bureaucracy currently imposed on business.

The proposal for a Council Regulation implementing Articles 81 & 82 of the Treaty

Effective and fair competition policy and its enforcement applied uniformly across the European Union is crucial to the goal of furthering European competitiveness and to ensuring that consumers in Europe receive a fair deal. Restraints of competition which cannot be justified on economic grounds will harm those consumers and competitors who comply with the rules.

The European Parliament has accepted that the current system of regulating European competition policy is too bureaucratic, cumbersome and ineffective. The Community needs a more workable, straightforward system, which is efficient, easy to comply with and which can detect and deal with problem areas effectively. Therefore, the initiative by the Commission to

radically overhaul the competition rules now, in advance of an enlarged Community, is welcome.

However, the new regime proposed by the Commission requires some modification, if the Commission is to achieve its intended objectives and ensure a regime that is practical in its application. Certain significant elements of the reform require clarification which the Commission has stated will be forthcoming in future Commission documents (regulations, notices and guidelines). These are essential to ensure full assessment of the proposed reform.

There are a number of key areas that need further consideration.

1. Application of EU law over national law (Article 3)

The Commission's proposal recommends a decentralised system of enforcement of competition rules intended to free up the Commission's resources to investigate more serious cases of misconduct and ensure better enforcement of the rules. In the new regime national authorities would hold much of the responsibility for policing competition policy.

Parliament has recognised that such a decentralised system of enforcement of competition rules could increase risk of inconsistent application of those rules. The Commission's proposed application of European competition law to the exclusion of national competition law where an agreement may affect trade between member states (Article 3) is therefore a welcome and essential feature of the new Regulation. It is fundamental that competition issues within the European Union are treated similarly in all member states and that the existence of a level playing field is ensured within the single market. Without consistent application of European law by all national authorities, a re-nationalisation of our competition policy would follow, which would be detrimental to the single market, to businesses and consumers alike. Any modification of Article 3 would seriously undermine the basis of the European Commission's proposed reforms.

It is also important that those Member States which have not yet empowered their competition authorities and courts to apply EU competition law, do so as soon as possible. This should include the decentralised application of Articles 81 and 82 of the EC Treaty and the establishment of independent national competition authorities.

The provisions of Article 3 should be coupled with a harmonisation of the sanctions that are applied at national level. The proposal says that sanctions should be determined by national courts (Article 5). However, the level of sanction varies between member states so it is important that the harmonisation also extends to sanctions.

2. Registration of agreements (Article 4)

The proposed reform involves the abolition of the current notification and authorisation system. This would reduce the burden to business and would free up more of the Commission's resources to investigate alleged abuses of the competition rules.

The new system will require undertakings to register agreements to the Commission that do not fall within the scope of Article 81(1) and that are not covered by a block exemption (Article

4.2). This information would be made available to the Commission and all the competition authorities of the Member States apparently to ensure transparency and consistency in the application of the new rules.

However, the balance of evidence suggests that it is difficult to determine what the real benefit of this “register” would be. It certainly could not be considered an effective means of discovering serious breaches of the rules, as hard-core cartels are highly unlikely to register such agreements. These new rules would mean companies would have to give mandatory notification of their agreements but would not have in return any entitlement to a response from the Commission.

This proposal would increase the regulatory burden on business without conferring any benefit of legal certainty. It would also create more administrative work for Commission officials and national competition authorities without providing any progress in detecting anti-competitive behaviour.

It has been suggested that registration could be accompanied by some benefit such as provisional validity. The introduction of such a system however risks recreating the current notification and authorisation process. The Commission has failed to satisfactorily establish the value of its proposed registration system and it should be abandoned.

3. Remedies

The Commission will have the power to impose any obligations necessary to bring an infringement to an end, including imposing remedies of a structural nature (Article 7). In the proposal, there are no limits set for the exercise of this new power and no details about when and how it might be applied. It is inappropriate and premature for the Commission to have such a wide-ranging power.

4. Inapplicability – Article 10

An additional concern about the Commission proposals for reform is that there is a serious reduction in legal certainty. The Commission proposes that it retain the right to take positive decisions on its own initiative "for reasons of Community public interest" (Article 10) which is welcomed. However, it is important that clarification is given as to what "Community public interest" actually means. As it stands, the Commission has complete discretion as to when it will intervene to take positive decisions.

In many cases, for example in relation to straightforward distribution agreements, the law is clear but in many other instances the position may be more difficult to assess. For example, it can be difficult to determine if an agreement falls within the block exemptions on vertical and horizontal agreements or not and the guidelines that the Commission produces do not always clarify the situation. There are many cases where businesses might legitimately feel apprehensive about entering a complex cross-border agreement without having legal certainty. The European Parliament has maintained its support for such legal certainty.

It is important for the Commission to be prepared to take positive decisions relating to certain limited cases and their own particular facts before an undertaking enters into an agreement. This would be essential particularly in situations where an agreement has an effect on trade

between Member States of the EU and

(i) which is ancillary to or involves a significant financial risk or capital investment or involves a potentially significant effect upon shareholder value or

(ii) involves the resolution of a novel issue of EU Competition law or involves the application of EU Competition law to a novel situation or to new or rapidly evolving markets or

(iii) which would to avoid the possibility of invalidity otherwise require clearance or authorisation under either the national competition law of a member state or under EU competition law from a competition authority of three or more Member states to ensure its validity or

(iv) the validity or enforceability of which is subject of any actual or threatened legal proceedings or arbitration process in any Member state or elsewhere.

Without such modifications to the proposed regime, the current proposals would lead to a significant reduction in legal predictability for businesses, who may then be unwilling to risk large investments, especially where the agreements could be subjected to multiple and prolonged challenges in national competition authorities and courts across Europe. The Commission should be available to give positive decisions at least in such cases. This would prevent the opening of the floodgates of enquiries into the Commission while ensuring the provision of legal certainty in such difficult cases.

The ability to consult the European Commission on specific cases should also be coupled with the introduction of tight deadlines within which decisions should be given by the Commission to avoid the delays and inefficiencies of the current notification system. Agreements often have to be made within tight time limits and so it is important that decisions are given promptly for the system to be efficient.

5. Networking between the Commission, national courts and national competition authorities

The successful operation of the new regime presupposes that national competition authorities are equipped to organise an effective network with the Commission and with other member states. The human and technical resources available to national competition authorities may therefore have to be reinforced.

Furthermore, it is essential that such a scheme of exchange of information is workable and so there must be some harmonisation of rules to make it all effective. For example, Article 12.1 says that member states can exchange evidence in any matter or fact of law including confidential information. In some Member States, competition authorities are not permitted to pass information on to third parties. If exchange of confidential information is permitted between different Member States' authorities, then steps must be taken to ensure that confidential information is not passed onto third parties. The question of the territorial limitation of national authorities as to their investigative powers as well as the legal effects of their decisions also raises questions.

In application of Articles 7-10, competition authorities shall inform the Commission before proceedings begin on a case and shall provide the Commission with all relevant documentation relating to a case (Article 11). Bearing in mind the significant differences in civil litigation and administrative procedures across the EU, the monitoring of the cases brought before national competition authorities and national courts could impose huge time and cost burdens on the Commission, burdens which the Commission said it had hoped to remove and which it is ill-equipped to deal with. There is a question therefore over whether this information system would result in lightening the Commission's workload and allowing it to focus its attention on more important cases. There is also a question as to whether providing information like this to the Commission would be sufficient to prevent divergent and inconsistent application of the rules.

6. Allocation of cases (Articles 4 – 6)

Given that the Commission, national authorities and national courts will all be involved in taking decisions on European competition law, it is essential that clear and consistent criteria are used for the allocation of cases. The concept of the "best placed authority" needs to be very clearly thought through and clarified if the regime is to have any realistic chance of success.

Furthermore, for legal certainty and consistency, a decision taken in one member state should apply throughout the Community for similar cases but it is very difficult to see how this would happen in practice. There is no obligation for one member state to accept a decision taken in another which could potentially give rise to a decision in one member state being prohibited elsewhere. The preferred solution would be for the Commission to hear cases affecting several member states to avoid multiple cases in other member states, "forum shopping" and inconsistency.

To assist in ensuring consistency in application of the rules, the Commission will be able to intervene in any case in national courts to make *ex officio* submissions of oral and written statements before courts of the member states which are hearing the cases falling under the scope of Articles 81 and 82, if the Community's public interest is involved (Article 15). This raises constitutional issues in some member states who may consider such European Commission intervention in national court systems as an infringement of the principle of separation of powers.

There have been serious concerns from many interested parties over national courts having the power to apply Article 81 (3) as provided for in Article 6. It has been argued by some that national courts in member states are not equipped to deal with effective application of Article 81(3) – they cannot deal with substantive economic assessments of both the anti- and pro-competitive impacts of agreements. If national courts or specialised courts dealing with competition cases are to be involved in the decision-making process, then the practicalities of further training or the creation of specialised courts would need extensive further consideration and discussion if the regime is to operate effectively.

7. Review by European Court of Justice

There should be clarification of the methods of recourse open to undertakings against decisions taken by the Commission or by national authorities. The European Court of Justice is clearly the appropriate body but typically judgements are reached many years after an agreement is

considered which is invariably too late. There is a need, for example, for some sort of interim appeal system before the European Court of Justice.

8. Transitional provisions

It is surprising that all existing exemptions will lapse after the new Regulation comes into being. It is difficult to understand why a decision of the Commission in application of Article 81 (3) should be invalidated forthwith when the new system comes into operation.. Some transitional period of continuing validity should be introduced to allow for an orderly introduction of the new structure.

9. Fines

The imposition of fines should be limited to undertakings that were involved in the activity in question and where intentional breach of EU competition law has been established.

10. Role of the Advisory Committee

The continued participation of the Advisory Committee in the new regime is welcomed. However, the Advisory Committee is not automatically consulted in all cases, only when the Commission requests it. Furthermore, the force and scope of the Committee's views is not clear. All of these aspects should be clarified.

11. Investigative powers of the Commission

The Commission must be able to carry out its investigations into possible infringements of the rules but there must be proper judicial control of its powers. There should also be sufficient safeguards for those involved in investigations such as the right to silence and the right to privacy. The reconciliation of national laws relating to protection of privacy with the Commission's new powers of investigation needs further examination.

There is no doubt that the current competition rules need reform to render them more efficient and effective. The Commission's decision to overhaul the enforcement of European competition rules is a welcome opportunity to improve the current system for all concerned. However, the Commission's proposals for reform require some modification, as in their current form they may risk damaging the progress made in completing the single market, would increase uncertainty for business and regulators alike and may not improve the efficiency of enforcement of the competition rules.

5 June 2001

OPINION OF THE COMMITTEE ON INDUSTRY, EXTERNAL TRADE, RESEARCH AND ENERGY

for the Committee on Economic and Monetary Affairs

on the proposal for a Council regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 (COM(2000)582 – C5-0527/2000 – 2000/0243((CNS)))

Draftsman: Willy C.E.H. De Clercq

PROCEDURE

The Committee on Industry, External Trade, Research and Energy appointed Willy C.E.H. De Clercq draftsman at its meeting of 23 November 2000.

It considered the draft opinion at its meeting of 29 May 2001.

At that meeting it adopted the following amendments by 42 votes to 1, with 4 abstentions.

The following were present for the vote: Carlos Westendorp y Cabeza, chairman; Peter Michael Mombaur, vice-chairman; Willy C.E.H. De Clercq, draftsman; Konstantinos Alyssandrakis, Yves Butel, Gérard Caudron, Giles Bryan Chichester, Nicholas Clegg, Elisa Maria Damião (for Elena Valenciano Martínez-Orozco), Harlem Désir, Concepció Ferrer, Christos Folias, Norbert Glante, Michel Hansenne, Malcolm Harbour (for Roger Helmer), Hans Karlsson, Bashir Khanbhai (for Anders Wijkman), Wolfgang Kreissl-Dörfler (for Massimo Carraro), Helmut Kuhne (for Glyn Ford), Werner Langen, Rolf Linkohr, Caroline Lucas, Nelly Maes, Erika Mann, Eryl Margaret McNally, Angelika Niebler, Hervé Novelli (for Dominique Vlasto), Reino Paasilinna, Yves Piétrasanta, Elly Plooij-van Gorsel, Samuli Pohjamo (for Colette Flesch), John Purvis, Godelieve Quisthoudt-Rowohl, Imelda Mary Read, Mechtild Rothe, Christian Foldberg Røvsing, Paul Rübig, Umberto Scapagnini, Ilka Schröder, Konrad K. Schwaiger, Esko Olavi Seppänen, Helle Thorning-Schmidt (for François Zimeray), Astrid Thors, Jaime Valdivielso de Cué, W.G. van Velzen, Alejo Vidal-Quadras Roca, Myrsini Zorba and Olga Zrihen Zaari.

SHORT JUSTIFICATION

The subject of the proposal is the reform of the implementing regulations for Articles 81 and 82 of the EC Treaty, i.e. Regulation No 17 and the corresponding transport regulations. The legal basis for the proposal is Article 83 of the EC Treaty which states that ‘The appropriate regulations or directives to give effect to the principles set out in Articles 81 and 82 shall be laid down by the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament.’

The Commission’s aim is to reduce the administrative burden arising from the application of Community competition law and to be able to deploy its human resources in a more efficient manner. The proposal should be seen in the context of the forthcoming enlargement: according to the Commission, its limited resources will not enable it, alone, to ensure compliance with the rules on competition throughout the territory of the European Union. The draftsman welcomes the proposal to amend the regulations currently in force in order to make the present system for applying the Community competition rules more efficient. Nevertheless, it should be pointed out that the clarity of the provisions and legal certainty (in particular as regards the applicable legal order and the competent authority) are essential requirements for economic actors.

Under the proposed system the competition authorities and courts of the Member States will be competent, in the same way as the Commission, to apply in full Articles 81 and 82 of the EC Treaty. There will therefore be an increase in the number of competent authorities. At present, only the European Commission, in accordance with Regulation No 17 of 1962, subject to the jurisdiction of the European Court, is competent in respect of ‘exemptions’ for agreements between undertakings, in other words the granting of derogations to the principle of prohibition to which they are subject under Article 81 of the EC Treaty.

One of the key elements of the Commission proposal is the setting up of a network comprising the Commission and the national competition authorities, designed to ensure close collaboration between these authorities with regard to the application of Article 81 and 82.

The proposal is also aimed at setting up a new ‘directly applicable exception system’, which would allow the direct application of both the prohibition principle set out in Article 81(1) and the exception rule contained in Article 81(3), not only by the Commission but also by the national courts and the competition authorities of the Member States. Under the system, agreements would be legal or void depending on whether they met the conditions set out in Article 81(3), and no decision granting administrative authorisation would be required for the implementation of agreements consistent with all the provisions of Article 81.

The national courts would have an increased role under the new system since individuals would apply to the national courts in order to enforce their rights. They would be able to grant damages or order the performance or non-performance of contracts.

Article 3 of the proposal for a regulation introduces a further modification. It states that *only* Community competition law is applicable where an agreement, a decision by an association of undertakings or a concerted practice within the meaning of Article 81 or the abuse of a dominant position within the meaning of Article 82 *may* affect trade between Member States. This raises two fundamental questions which have an important bearing on the legal certainty

which undertakings must enjoy: which authority is competent and which legal order is applicable?

The proposal contains many provisions under which the Commission 'may' act. This may lead to uncertainty among economic actors as to which authority is competent. Undertakings in particular see a danger of having to deal with several procedures concurrently before different authorities. They are also afraid that the uniform application of Community competition law will not be ensured and call for a more precise definition of the respective competences of the Commission and the Member States.

It is in this context that the draftsman supports the Commission's intention to adopt a communication setting out criteria for determining the allocation of competition law cases to the Member States and the Commission. The communication also needs to provide for measures aimed at providing assistance to undertakings in dealing with the new system.

AMENDMENTS

The Committee on Industry, External Trade, Research and Energy calls on the Committee on Economic and Monetary Affairs, as the committee responsible, to incorporate the following amendments in its report:

Text proposed by the Commission¹

Amendments by Parliament

Amendment 1 Recital 1 a (new)

(1a) The coexistence of national and Community rules on competition is a source of potential legal uncertainty. It is essential, in the interest of individual legal persons, to establish legal certainty as far as possible.

Justification

The addition clarifies the aim of ensuring, by including the Member States' authorities and courts, that legal fragmentation does not increase but rather that acceptance of Community law improves, thus strengthening legal certainty for market operators in the individual Member States in relation to practice in all the Member States.

Amendment 2 Recital 8

(8) In order to ensure that the same competition rules apply to businesses throughout the Community, provision must be made pursuant to Article 83(2)(e) to regulate the relationship between Articles 81 and 82 and national competition law by excluding the application of national law to agreements, decisions and practices within the scope of Articles 81 and 82.

(8) In order to ensure that the same competition rules apply to businesses throughout the Community ***and provide legal certainty for individual legal persons***, provision must be made pursuant to Article 83(2)(e) to regulate the relationship between Articles 81 and 82 and national competition law by excluding the application of national law to agreements, decisions and practices within the scope of Articles 81 and 82.

¹ OJ C 365, 19.12.2000, p. 284.

Justification

The addition clarifies the aim of ensuring, by including the Member States' authorities and courts, that legal fragmentation does not increase but rather that acceptance of Community law improves, thus strengthening legal certainty for market operators in the individual Member States in relation to practice in all the other Member States.

Amendment 3

Recital 15

(15) If the competition rules are to be applied consistently and, at the same time, the network is to be managed in the best possible way, it is essential to retain the rule that the competition authorities of the Member States are automatically relieved of their competence if the Commission initiates its own proceedings.

(15) If the competition rules are to be applied consistently and, at the same time, the network is to be managed in the best possible way, it is essential to retain the rule that the competition authorities of the Member States are automatically relieved of their competence if the Commission initiates its own proceedings; ***this option should remain as part of its responsibility for implementing Community competition law and safeguarding legal uniformity throughout the EU internal market.***

Justification

The addition makes it clear that the Commission's power to initiate proceedings in order to preserve legal uniformity in the EU internal market cannot be relinquished.

Amendment 4

Recital 18

(18) Consistency in the application of the competition rules also ***requires*** that arrangements be established for cooperation between the courts of the Member States and the Commission. In particular, it will be useful to allow national courts to ask the Commission for information or for its opinion on points concerning the application of Community competition law. The Commission and the competition authorities

(18) Consistency in the application of the competition rules ***and the need to safeguard legal certainty for legal persons*** also ***require*** that arrangements be established for cooperation between the courts of the Member States and the Commission. In particular, it will be useful to allow national courts to ask the Commission for information or for its opinion on points concerning the application of Community

of the Member States must also be able to submit written or oral observations to courts called upon to apply Article 81 or Article 82. Steps must therefore be taken to ensure that the Commission and the competition authorities of the Member States are kept sufficiently well informed of proceedings before national courts.

competition law. The Commission and the competition authorities of the Member States must also be able to submit written or oral observations to courts called upon to apply Article 81 or Article 82. Steps must therefore be taken to ensure that the Commission and the competition authorities of the Member States are kept sufficiently well informed of proceedings before national courts.

Justification

The addition clarifies the aim of ensuring, by including the Member States' authorities and courts, that legal fragmentation does not increase but rather that acceptance of Community law improves, thus strengthening legal certainty for market operators in the individual Member States in relation to practice in all the other Member States.

Amendment 5 Article 3

Relationship between Articles 81 and 82 and national competition laws

Where an agreement, a decision by an association of undertakings or a concerted practice within the meaning of Article 81 of the Treaty or the abuse of a dominant position within the meaning of Article 82 **may** affect trade between Member States, Community competition law shall apply to the exclusion of national competition laws.

Where an agreement, a decision by an association of undertakings or a concerted practice within the meaning of Article 81 of the Treaty or the abuse of a dominant position within the meaning of Article 82 **affects** trade between Member States, Community competition law shall apply to the exclusion of national competition laws.

Justification

To ensure clarity, it is advisable to provide for the application of Community law only in cases in which trade between the Member States is definitively affected.

Amendment 6 Article 4(2)

2. The Commission may, by regulation, determine types of agreements, decisions

deleted

of associations of undertakings and concerted practices caught by Article 81(1) of the Treaty which must be registered by undertakings. In that event, it shall also determine the procedures for such registration and the penalties applicable in the event of failure to comply with the obligation. Registration of an agreement, a decision of an association or a concerted practice shall confer no entitlement on the registering undertakings or associations of undertakings and shall not form an obstacle to the application of this Regulation.

Justification

In view of the fact that the Commission proposal is aimed at reducing bureaucratic requirements under the Community law framework (abolition of the notification system) it is not desirable for a new registration obligation to be introduced which, in any case, confers no rights on undertakings.

Amendment 7 Article 5

The competition authorities of the Member States shall have the power in individual cases to apply the prohibition in Article 81(1) of the Treaty where the conditions of Article 81(3) are not fulfilled, and the prohibition in Article 82. For this purpose, acting on their own initiative or on a complaint, they may take any decision requiring that an infringement be brought to an end, adopting interim measures, accepting commitments or imposing fines, periodic penalty payments or any other penalty provided for in their national law. Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part.

The competition authorities of the Member States shall have the power in individual cases to apply the prohibition in Article 81(1) of the Treaty where the conditions of Article 81(3) are not fulfilled, and the prohibition in Article 82. For this purpose, acting on their own initiative or on a complaint, they may take any decision requiring that an infringement be brought to an end, adopting interim measures, accepting commitments or imposing fines, periodic penalty payments or any other penalty provided for in their national law. ***The Commission shall issue guidelines setting out the framework conditions for the possible penalties.*** Where on the basis of the information in their possession the conditions for prohibition are not met they

may likewise decide that there are no grounds for action on their part.

Justification

Under Article 3 Community law, and not national competition law, alone determines the law that is applicable. In view of the variation in national rules in the domain of penalties it is desirable in the interest of uniformity for the Commission to set out the framework conditions.

Amendment 8
Article 8(1)

1. In cases of urgency due to the risk of serious and irreparable damage to **competition**, the Commission, acting on its own initiative may, on the basis of a prima facie finding of infringement, by decision order interim measures.

1. In cases of urgency due to the risk of serious and irreparable damage to **a group of consumers or to one or more undertakings**, the Commission, acting on its own initiative may, on the basis of a prima facie finding of infringement, by decision order interim measures.

Justification

Rather than referring to 'competition' in general, it is preferable to identify more precisely those who are suffering from the damage in question.

Amendment 9
Article 8, paragraph 2

2. A decision under paragraph 1 shall apply for a maximum of one year but shall be renewable.

2. A decision under paragraph 1 shall apply for a maximum of one year but shall be renewable **in so far as this is necessary and appropriate.**

Justification

The proposal needs tightening up, particularly as it is a one-off measure.

Amendment 10
Article 11

Cooperation between the Commission and the competition authorities of the Member States

1. The Commission and the competition authorities of the Member States shall apply the Community competition rules in close cooperation.
2. The Commission shall forthwith transmit to the competition authorities of the Member States copies of ***the most important*** documents it has collected with a view to applying Articles 7 to 10.
3. Where a matter involving the application of Article 81 or Article 82 of the Treaty is referred to the competition authorities of the Member States or where they act on their own initiative to apply those Articles, they shall inform the Commission accordingly at the outset of their own proceedings.
4. Where competition authorities of Member States intend to adopt a decision under Article 81 or Article 82 of the Treaty requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption regulation, they shall first consult the Commission. For that purpose, they shall no later than one month before adopting the decision provide the Commission with a summary of the case and with copies of ***the most important*** documents drawn up in the course of their own proceedings. At the Commission's request, they shall provide it with a copy of any other document relating to the case.
5. The competition authorities of the Member States may consult the Commission on any other case involving the application of Community law.
6. The initiation by the Commission of proceedings for the adoption of a decision under this Regulation shall relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82 of the Treaty.

1. The Commission and the competition authorities of the Member States shall apply the Community competition rules in close cooperation.
2. The Commission shall forthwith transmit to the competition authorities of the Member States copies of ***all of the necessary*** documents it has collected with a view to applying Articles 7 to 10.
3. Where a matter involving the application of Article 81 or Article 82 of the Treaty is referred to the competition authorities of the Member States or where they act on their own initiative to apply those Articles, they shall inform the Commission accordingly at the outset of their own proceedings.
4. Where competition authorities of Member States intend to adopt a decision under Article 81 or Article 82 of the Treaty requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption regulation, they shall first consult the Commission. For that purpose, they shall no later than one month before adopting the decision provide the Commission with a summary of the case and with copies of ***all of the necessary*** documents drawn up in the course of their own proceedings. At the Commission's request, they shall provide it with a copy of any other document relating to the case.
5. The competition authorities of the Member States may consult the Commission on any other case involving the application of Community law.
6. The initiation by the Commission of proceedings for the adoption of a decision under this Regulation shall relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82 of the Treaty.

Justification

In order to ensure the consistent application of competition law it is important that the national authorities and the Commission have all the necessary documents at their disposal before adopting a decision. The exchange of information between the Commission and the competition authorities of the Member States is essential for the smooth operation of the new system proposed by the Commission.

Amendment 11
Article 34, point a
Implementing provisions

(a) the introduction of a registration requirement for certain types of agreement; ***deleted***

Justification

In view of the fact that the Commission proposal is aimed at reducing bureaucratic requirements under the Community law framework (abolition of the notification system) it is not desirable for a new registration obligation to be introduced which, in any case, confers no rights on undertakings.

Amendment 12
Article 36 a (new)

Insert a new Article 36a to read as follows:

Article 36a

Report on the application of the present regulation

After a period of three years from the entry into force of the regulation, the Commission shall submit a report in which it analyses the ability of the national courts and authorities to apply the provisions of the present regulation. In the report the Commission shall propose measures aimed at improving training in Community competition law,

***access to the necessary information and
the consistency of the application of
Community competition law.***

Justification

In order to ensure the smooth operation of the new system it is essential to check – following an initial period of application – whether the national authorities and courts have all the necessary means available to them for performing the tasks conferred on them by the present regulation and to identify measures aimed at facilitating their work.

13 June 2001

OPINION OF THE COMMITTEE ON LEGAL AFFAIRS AND THE INTERNAL MARKET

for the Committee on Economic and Monetary Affairs

on the proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 (COM(2000) 582 – C5-0527/2000 – 2000/0243(CNS))

Draftsman: Ana Palacio Vallelersundi

PROCEDURE

The Committee on Legal Affairs and the Internal Market appointed Ana Palacio Vallelersundi draftsman at its meeting of 17 October 2000.

It considered the draft opinion at its meetings of 14 May 2001 and 12 June 2001.

At the last meeting it adopted the following amendments by 24 votes to 2, with 0 abstention.

The following were present for the vote: Ana Palacio Vallelersundi, chairman; Willi Rothley, vice-chairman; Rainer Wieland, vice-chairman; Ward Beysen, vice-chairman; Enrico Boselli, Charlotte Cederschiöld, Bert Doorn, Colette Flesch, Janelly Fourtou, Marie-Françoise Garaud, Malcolm Harbour, Heidi Anneli Hautala, Ole Krarup, Ioannis Koukiadis, Kurt Lechner, Klaus-Heiner Lehne, Neil MacCormick, Toine Manders, Hans-Peter Mayer, Arlene McCarthy, Manuel Medina Ortega, Bill Miller, Felekna Uca, Rijk van Dam (for Véronique Mathieu pursuant to Rule 153(2)), Michiel van Hulten (for Evelyne Gebhardt pursuant to Rule 153(2)), Diana Wallis, Stefano Zappalà and Jürgen Zimmerling.

SHORT JUSTIFICATION

General observations

Your draftsman has much sympathy with the view that the familiar system of competition law which has served the Community so well should not be unnecessarily interfered with.

However, this is a time of rapid change with globalising markets and competition increasingly taking place between economic blocs: the EU, the US and Japan, and accordingly the Commission has put forward a proposal designed to ensure that the Internal Market has a common competition policy which takes proper account of the Community interest by ensuring that all national competition authorities (NCAs) apply Community law, rather than national competition law, to agreements and practices affecting trade between Member States.

This is why the Commission is proposing (a) to replace prior notification (and comfort letters) by a directly applicable system of exemptions under which agreements are to be regarded as lawful where they meet the prescribed conditions and (b) to divest itself of its exclusive power to declare an agreement lawful, that power now being vested in the NCAs and courts, which are to be able to apply Community law directly. Your draftsman would note that this is hedged about with safeguards and completely consistent with the idea that the ordinary courts (*le juge du droit commun*) are courts of Community law, which underlies the whole Community judicial system.

The aim is to strengthen enforcement and create a level playing field through the EU. The fact that there will be more decision-makers applying the same rules should be a strength and not a weakness of the new system in that it will strengthen enforcement and enhance the protection of competition.

Close cooperation in applying the rules will make for greater efficiency by avoiding multiplicity of proceedings and allowing cases to be dealt with at the appropriate level and by the best-placed authority. Moreover, in an integrated market, multiple barriers create inefficiencies by distorting competition and increasing companies' costs. This is why we need uniform competition rules. At present, companies entering into agreements have to examine the position under the laws of all the Member States affected and comply with the strictest national requirements.

Moreover, this proposal has ramifications also beyond the realm of competition law in that it reflects the Commission's view of the future design of the institutional system, which is to be based on good governance and networking. As part of its concept of governance, the Commission wants to divest itself of aspects with no "Community value added". But it is prepared to seek more powers for its limited core activities.

Key features of the new system will be a common network linking NCAs and the Commission, reflecting the new multilateral collaboration. This will facilitate cooperation on fact-finding and information; case allocation; the consistent application of EC law. It will also enable cooperation to take place in respect of other matters of common interest.

A further feature of the system, which has aroused a good deal of controversy is that - in contrast to the exclusive competence under the merger system - there will be parallel

competences. This will give rise to the need for case allocation and for the avoidance of multiple controls. The Commission's idea is to make sure that the best placed authority is allocated the case and it intends to set out its case-allocation criteria in a communication, on the ground that rigid rules are inappropriate in the context of a system of parallel competences. The fact that agreements and practices will be judged *ex post* entails a measure of flexibility. Your draftsman's understanding is that the Commission intends to link infringements and territory to take account of the potential impact on consumers in so far as the NCA must be able to collect evidence, bring the infringement to an end and impose an appropriate sanction.

Lastly, the Commission will deal with cases where its intervention will add value as a non-national body and result in greater efficiency (*e.g.* where more than 3 Member States are involved). It is essential in fact that the Commission, as guardian of the Treaty, stays in the game.

One misconception about the proposed system is that it will constitute a re-nationalisation of competition law. In fact it is completely the opposite. There will still be preliminary rulings under Article 234 and they will be complemented by the network and by the Commission's action: (a) NCAs must contact the Commission at least one month before taking a prohibition decision or a decision withdrawing the benefit of block exemption; (b) the Commission retains the power to withdraw a case from a NCA by opening a procedure itself. The decision adopted by the Commission would be attackable in the ECJ. These are important safeguards.

In order to dispel a certain number of misconceptions, your draftsman would emphasise the importance of the retention of block exemption, which covers over 80% of cases, a possibility which does not exist in other jurisdictions such as the USA, and the value of the proposed business review letters in clarifying the law and obviating legal uncertainty.

Your draftsman further strongly supports the principle laid down in Article 3 whereby Community competition law is to apply to the exclusion of national competition laws. She is also strongly in favour of the power to impose fines for negligent infringements: if the Commission had invariably to prove intention, competition law would be liable to be frustrated.

Your draftsman further believes it essential that the Commission should have the power (under Article 7) to impose remedies of a structural nature. This is an essential instrument in the armoury of any competition authority.

Specific observations

Your draftsman has put forward a number of amendments designed to increase legal certainty and promote uniformity in the application of Community competition law. She is particularly concerned to insure that the operation of the new system is properly monitored and subject to the scrutiny of the European Parliament.

AMENDMENTS

The Committee on Legal Affairs and the Internal Market calls on the Committee on Economic and Monetary Affairs, as the committee responsible, to incorporate the following amendments in its report:

Text proposed by the Commission¹

Amendments by Parliament

Amendment 1
Article 3

Where an agreement, a decision by an association of undertakings or a concerted practice within the meaning of Article 81 of the Treaty or the abuse of a dominant position within the meaning of Article 82 may affect trade between Member States, Community competition law shall apply ***to the exclusion of*** national competition laws.

Where an agreement, a decision by an association of undertakings or a concerted practice within the meaning of Article 81 of the Treaty or the abuse of a dominant position within the meaning of Article 82 may affect trade between Member States, Community competition law shall apply ***in preference to*** national competition laws.

Justification

Maintains the priority character of Community law but preserves the twofold barrier.

Or. es

Amendment 2
Article 5

The competition authorities of the Member States shall have the power in individual cases to apply the prohibition in Article 81(1) of the Treaty where the conditions of Article 81(3) are not fulfilled, and the prohibition in Article 82. For this purpose, acting on their own initiative or on a complaint, they may take any decision requiring that an infringement be brought to an end, adopting interim measures, accepting commitments or imposing fines, periodic penalty payments or any other penalty provided for in their national law. Where on the basis of the information in their possession the conditions for prohibition are not met, they may likewise

The competition authorities of the Member States shall have the power in individual cases to apply the prohibition in Article 81(1) of the Treaty where the conditions of Article 81(3) are not fulfilled, and the prohibition in Article 82. For this purpose, acting on their own initiative or on a complaint, they may take any decision requiring that an infringement be brought to an end, adopting interim measures, accepting commitments or imposing fines ***in accordance with Article 22***, periodic penalty payments ***in accordance with Article 23*** or any other penalty provided for in their national law, ***provided that such penalty is proportionate and in***

¹ OJ C 365, 19.12.2000, p.284.

decide that there are no grounds for action on their part.

accordance with the general principles of Community law. Where on the basis of the information in their possession the conditions for prohibition are not met, they may likewise decide that there are no grounds for action on their part.

Justification

It is essential to ensure uniformity in the application of Community law, also as regards the imposition of fines, periodic penalty payments and other penalties, in order, inter alia, to avoid forum shopping.

Amendment 3 Article 6

National courts before which the prohibition in Article 81(1) of the Treaty is invoked shall also have jurisdiction to apply Article 81(3).

National courts before which the prohibition in Article 81(1) of the Treaty is invoked **on a subsidiary basis** shall also have jurisdiction to apply Article 81(3).

Those national courts shall also have jurisdiction to entertain an application by a complainant to annul a decision of a national competition authority rejecting its complaint.

Justification

The courts of the Member States (except for those responsible for reviewing the administrative decisions of the competition authorities) can apply Community competition law on an 'incidental' basis and the national competition authorities are required to apply the law on a 'principal' basis, in accordance with the distinction agreed by the ECJ after the judgment in Case 127/73 BRT v. SABAM [1974] ECR 313.

Furthermore the procedural rights of complainants are very different under Community law and under the national laws of Member States. In some Member States, they do not seem to have any right to ask a court to annul a decision of the national competition authority rejecting their complaint. If these rights are not harmonised, complainants will have very strong reasons for complaining to whichever authority's procedures are most favourable to them. Also, if a complainant's procedural rights are substantially reduced by a Commission decision to transfer the complaint to a national competition authority, the decision to transfer

would almost certainly be open to challenge under Article 230, since it would significantly alter the complainant's legal position. This would be obvious if the complaint was transferred from the Commission, against whose decisions there is a right to obtain judicial review, to a national competition authority which could reject a complaint without being subject to any judicial review in national courts. The right to judicial review is also a fundamental right.

Or. es

Amendment 4
Article 7, paragraph 2 a (new)

2a. In competition procedures, interested parties shall comprise, not only natural or legal persons having legitimate individual or collective rights or interests such as to enable them to call for a procedure to be instituted, but also persons having rights as a result of any decision taken in the procedure and persons having legitimate individual or collective interests which may be affected as a result of any settlement.

Interested parties within the meaning of the first subparagraph of this paragraph shall have ease of access to the documents produced in the procedure, with the exception of such documents as are declared to be confidential.

Justification

There is a need to define the concept of 'interested party' and access to the case records.

Or. es

Amendment 5
Article 10, paragraph 2 a (new)

In assessing the Community public interest with reference to Article 82 of the Treaty, the Commission shall take into account whether an agreement affecting trade between Member States:

(a) is associated with or involves a significant financial risk or capital investment having regard to the size or economic power of the undertakings in question or may have a significant effect on the value of shares, or

(b) involves the determination of a novel issue of European competition law or the application of that law to new conditions or to new or rapidly growing markets.

Justification

The 'Community public interest' needs to be better defined in order to increase legal certainty.

Or. da

Amendment 6
Article 12, paragraph 1

1. Notwithstanding any national provision to the contrary, the Commission and the competition authorities of the Member States may provide one another with and use in evidence any matter of fact or of law, including confidential information.

1. Notwithstanding any national provision to the contrary ***and in any case excepting constitutionally established guarantees***, the Commission and the competition authorities of the Member States may provide one another with and use in evidence any matter of fact or of law, including confidential information.

Justification

The rights of defence need strengthening. And in view of the present doubt as to whether or not the structural measures provided for in Article 7 are in the nature of a penalty, there is a need to make suitable provision.

Or. es

Amendment 7
Article 12, paragraph 2

2. Information provided under paragraph 1 may be used only for the purpose of applying Community competition law. Only financial penalties may be imposed on the basis of information provided.

2. Information provided under paragraph 1 may be used only for the purpose of applying Community competition law. ***A penalty may in no case be imposed on the basis of confidential documentation that the accused has not had the opportunity to rebut.***

Justification

See the justification to Amendment 6.

Or. es

Amendment 8
Article 14, paragraph 2

2. The Advisory Committee shall be composed of representatives of the competition authorities of the Member States. Each Member State shall appoint a representative who, if prevented from attending, may be replaced by another representative.

2. The Advisory Committee shall be composed of representatives of the competition authorities of the Member States ***responsible for settling the cases***. Each Member State shall appoint a representative who, if prevented from attending, may be replaced by another representative.

Justification

When there are two competition authorities in a Member State, one responsible for examination and the other for settlement of the case, the latter should be the one represented on the Advisory Committee.

Or. es

Amendment 9
Article 14, paragraph 5

5. The opinion of the Advisory Committee shall be delivered in writing and appended to the draft decision. ***The Advisory Committee may recommend publication of the opinion. The Commission may carry out such***

5. The opinion of the Advisory Committee shall be delivered in writing, appended to the draft decision ***and made public. Publication*** shall take account of the legitimate interest of undertakings in the protection of their

publication. The decision to publish shall take account of the legitimate interest of undertakings in the protection of their business secrets.

business secrets.

Justification

To increase transparency.

Or. es

Amendment 10 Article 15

1. In proceedings for the application of Article 81 or Article 82 of the Treaty, courts of the Member States may ask the Commission for information in its possession or for its opinion on questions concerning the application of the Community competition rules.

1. In proceedings for the application of Article 81 or Article 82 of the Treaty, courts of the Member States may ask the Commission for information in its possession or for its opinion on questions concerning the application of the Community competition rules.

2. Courts of the Member States shall send the Commission copies of any judgments applying Article 81 or Article 82 of the Treaty within one month of the date on which the judgment is delivered.

2. Courts of the Member States shall send the Commission copies of any judgments applying Article 81 or Article 82 of the Treaty within one month of the date on which the judgment is delivered.

3. For reasons of the Community public interest, the Commission may, on its own initiative, submit written or oral observations to courts of the Member States on the subject of proceedings in which questions concerning the application of Article 81 or Article 82 of the Treaty arise. It may have itself represented by competition authorities of Member States. Acting on their own initiative, competition authorities of Member States may likewise submit written or oral observations to the national courts of their Member State.

3. For reasons of the Community public interest, the Commission may, on its own initiative ***or at the request of the national court or the national competition authority***, submit written or oral observations to courts of the Member States on the subject of proceedings in which questions concerning the application of Article 81 or Article 82 of the Treaty arise. It may have itself represented by competition authorities of Member States. Acting on their own initiative, competition authorities of Member States may likewise submit written or oral observations to the national courts of their Member State.

To this end, the Commission and the competition authorities of the Member States may request the national courts to transmit to them any documents necessary.

To this end, the Commission and the competition authorities of the Member States may request the national courts to transmit to them any documents necessary.

4. The Member States shall amend their court legislation when this does not contain the provisions needed to allow for intervention under this Article.

5. This Article shall be without prejudice to the discretion of the national court or the national competition authority to summon the Commission to give evidence in competition proceedings.

6. Member States shall submit the draft legislation or regulations necessary in order to implement these provisions to the Commission by no later than [six months after the date of entry into force].

Justification

.Among other considerations, there is no provision in some court legislation for such intervention by the Commission, thus necessitating the reform of such legislation.

Amendment 11 Article 19

In order to carry out the duties assigned to it by this Regulation, the Commission may interview any natural or legal person that may be in possession of useful information, in order to ask questions relating to the subject-matter of an investigation and recording the answers.

In order to carry out the duties assigned to it by this Regulation, the Commission may interview any natural or legal person that may be in possession of useful information, in order to ask questions relating to the subject-matter of an investigation and recording the answers. ***The natural or legal person interviewed shall be entitled to have a lawyer present during the interview.***

When a declaration is received by persons who may have a charge laid against them, those persons shall be granted all defence rights, including the right of legal assistance and the right not to incriminate themselves.

In the case of lawyers acting in a professional capacity, this power shall be subject to lawyer-client confidentiality (legal privilege).

Justification

The Commission proposes that it should have the power to question individuals, inter alia, during surprise inspections. If this power is to be given, safeguards should be imposed to protect both the enterprise and the individual in question against being obliged or persuaded to incriminate themselves. It is true that Community competition law does not allow any Community penalties to be imposed on employees. But it is perfectly possible that an individual employee, in answering questions during a surprise visit intended to enforce Community competition law against the enterprise, might say things which would be used in evidence against the employee in proceedings for infringing national competition law. It is therefore proposed that the enterprise or the individual should be entitled to have a lawyer present during the questioning. It is also necessary to ensure that professional lawyers enjoy legal privilege. This amendment is intended to strengthen defence rights when, quite properly, investigating rights are also being strengthened.

Or. en

Amendment 12

Article 20, paragraph 2, subparagraph (f)

(f) to ask any representative or member of staff of the undertaking or association of undertakings for information relating to the subject-matter and purpose of the inspection and to record the answers.

(f) to ask any representative or member of staff of the undertaking or association of undertakings for information relating to the subject-matter and purpose of the inspection and to record the answers. ***The representative or member of staff questioned shall be entitled to have a lawyer present during the interview;***

Justification

See the justification to Amendment 11.

Or. en

Amendment 13

Article 20, paragraph 2, subparagraph (f a) (new)

(fa) to arrange to be accompanied by experts or persons qualified in the matters that the inspection concerns.

Justification

To strengthen the Commission's investigating powers and at the same time the defence rights of those concerned.

Or. es

Amendment 14

Article 20, paragraph 7

7. Where the officials authorised by the Commission wish to exercise the power provided for by ***paragraph 2(b)***, authorisation from the judicial authority must be obtained beforehand.

7. Where the officials authorised by the Commission wish to exercise ***any*** power provided for by ***paragraph 2***, authorisation from the judicial authority must be obtained ***in accordance with national legislation, unless there is a record of the express consent of the person concerned.***

Justification

In some Member States, as in the case of Spain, business premises are deemed to be a residence for the purposes of inviolability and there is therefore a need for judicial authorisation to enter them.

Or. es

Amendment 15

Article 22, paragraph 1, introductory phrase

1. The Commission may by decision impose on undertakings and associations of undertakings fines not exceeding 1 % of the total turnover in the preceding business year where, intentionally or negligently:

1. The Commission ***or a national competition authority*** may by decision impose on undertakings and associations of undertakings fines not exceeding 1 % of the total turnover in the preceding business year where, intentionally or negligently:

Justification

To promote uniformity of penalties.

Or. en

Amendment 16

Article 22, paragraph 1, subparagraph (a)

(a) they supply incorrect, incomplete or misleading information in response to a request made pursuant to Article 17 or Article 18(1) or (4), or do not supply information within the time-limit fixed by a decision adopted pursuant to Article 18(4);

(a) they supply incorrect, incomplete or misleading information in response to a request made pursuant to Article 17 or Article 18(1) or (4), or do not supply information within the time-limit fixed by a decision adopted pursuant to Article 18(4).
The right not to incriminate oneself shall be excepted;

Justification

Strengthens the defence rights and safeguards of the persons concerned.

Or. es

Amendment 17

Article 22, paragraph 2

2. The Commission may by decision impose on undertakings and associations of undertakings fines not exceeding 10 % of the total turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently:

2. The Commission ***or a national competition authority*** may by decision impose on undertakings and associations of undertakings fines not exceeding 10 % of the total turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently:

Justification

To promote uniformity of penalties.

Or. en

Amendment 18
Article 22, paragraph 4

4. Where a fine is imposed on an association of undertakings under this Regulation and the association is not solvent, the Commission may require payment of the fine by any of the undertakings which were members of the association at the time the infringement was committed. The amount required to be paid by each individual member cannot exceed 10 % of its total turnover in the preceding business year.

4. Where a fine is imposed on an association of undertakings under this Regulation and the association is not solvent, the Commission ***or the national competition authority, as the case may be***, may require payment of the fine by any of the undertakings which were members of the association at the time the infringement was committed. The amount required to be paid by each individual member cannot exceed 10 % of its total turnover in the preceding business year.

Justification

To promote uniformity of penalties.

Or. en

Amendment 19
Article 22 a (new)

Article 22a

Proportionality of fines

1. The fine imposed shall be proportional to the gravity and duration of the infringement. Where there are several persons involved in the infringement, the fines imposed shall be graduated so as to reflect their degree of involvement.

2. The following criteria shall be taken into account for the purpose of the graduation of fines:

(a) the gravity of the infringement, having regard to nature, its practical repercussions on the market and the size of the geographical market affected;

(b) the duration of the infringement;

- (c) its recurrence;*
- (d) effective non-application;*
- (e) cooperation with any kind of investigative activity by the Commission or the national competition authority;*
- (f) the unlawful benefits obtained as a result of the infringement.*

Justification

To incorporate in a legislative text the principles of the Commission Guidelines 98/C 9/03 of 14 January 1998 and in so far as they are compatible with the criteria in the Communication on persons providing information of 18 July 1996.

Or. es

Amendment 20

Article 23, paragraph 1, introductory phrase

1. The Commission may, by decision, impose on undertakings or associations of undertakings periodic penalty payments not exceeding 5 % of the average daily turnover in the preceding business year per day and calculated from the date appointed by the decision, in order to compel them:

1. The Commission ***or a national competition authority*** may, by decision, impose on undertakings or associations of undertakings periodic penalty payments not exceeding 5 % of the average daily turnover in the preceding business year per day and calculated from the date appointed by the decision, in order to compel them:

Justification

To promote uniformity of penalties.

Or. en

Amendment 21

Article 23, paragraph 2

2. Where the undertakings or associations of undertakings have satisfied the obligation which the periodic penalty payment was intended to enforce, the Commission may

2. Where the undertakings or associations of undertakings have satisfied the obligation which the periodic penalty payment was intended to enforce, the Commission ***or the***

fix the definitive amount of the periodic penalty payment at a figure lower than that which would arise under the original decision. Article 22(4) shall apply by analogy.

national competition authority, as the case may be, may fix the definitive amount of the periodic penalty payment at a figure lower than that which would arise under the original decision. Article 22(4) shall apply by analogy.

Justification

To promote uniformity of penalties.

Or. en

Amendment 22
Article 23 a (new)

Article 23a

Presumption of innocence

1. The procedure governed by this Regulation shall respect the presumption of non-existence of responsibility until the contrary is shown.

2. The facts declared proven by final judgment in criminal proceedings shall bind the Commission and the national authorities with regard to any proceedings that they initiate.

Justification

Improves the safeguards for those concerned in relation to the powers of the authorities.

Or. es

Amendment 23
Article 24, paragraph 3

3. Any action taken by the Commission or by the competition authority of a Member State for the purpose of the

3. Any action taken by the Commission or by the competition authority of a Member State for the purpose of the

investigation or proceedings in respect of an infringement shall interrupt the limitation period for the imposition of fines or periodic penalty payments. ***The limitation period shall be interrupted with effect from the date on which the action is notified to at least one undertaking or association of undertakings*** which has participated in the infringement. Actions which interrupt the running of the period shall include ***in particular*** the following:

(a) written requests for information by the Commission or by the competition authority of a Member State;

(b) written authorisations to conduct inspections issued to its officials by the Commission or by the competition authority of a Member State;

(c) the initiation of proceedings by the Commission or by the competition authority of a Member State;

(d) notification of the statement of objections of the Commission or of the competition authority of a Member State.

investigation or proceedings in respect of an infringement shall interrupt the limitation period for the imposition of fines or periodic penalty payments. ***Notification of the action shall extend the limitation period with regard to the notified person concerned who*** has participated in the infringement ***and solely with regard to that person.*** Actions which interrupt the running of the period shall include the following:

(a) the initiation of proceedings by the Commission or by the competition authority of a Member State;

(b) notification of the statement of objections of the Commission or of the competition authority of a Member State.

Justification

Interruption of the limitation period should only occur in the case of the person against whom the proceedings are being taken, as indeed the principle of legal certainty requires. And interruption takes place when proceedings are initiated, not as a result of previous actions.

Or. es

Amendment 24 Article 24, paragraph 4

4. The interruption of the limitation period shall apply ***for all the undertakings or associations of undertakings which have participated in the infringement.***

4. The interruption of the limitation period shall apply ***solely for undertakings or associations of undertakings with regard to which procedures have been initiated.***

Justification

See the justification to amendment 23.

Or. es

Amendment 25
Article 24, paragraph 5

5. Each interruption shall start time running afresh. However, the limitation period shall **expire** at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a periodic penalty payment. That period shall be extended by the time during which limitation is suspended pursuant to paragraph 6.

5. The limitation period shall be renewed if the case is delayed for more than six months for reasons not attributable to the person alleged responsible. However, the limitation period shall **be extended** at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a periodic penalty payment. That period shall be extended by the time during which limitation is suspended pursuant to paragraph 6.

Justification

To prevent the limitation period being interrupted as a result of a failure to act on the part of the Commission.

Or. es

Amendment 26
Article 26, paragraph 1 a (new)

1a. The Commission shall open a period for submitting evidence during which any evidence that interested persons propose and that is declared relevant may be produced. Rejection of evidence shall be by means of a reasoned decision.

Evidence for acquittal may be put forward at any stage of the case up to proposal of the definitive Decision.

Justification

Strengthens the defence rights and safeguards in proceedings.

Or. es

Amendment 27

Article 26, paragraph 2, subparagraph 1

2. The rights of defence of the parties concerned shall be fully respected in the proceedings. They shall be entitled to have access to the file, subject to the legitimate interest of undertakings in the protection of their business secrets. That legitimate interest may not constitute an obstacle to the disclosure and use by the Commission of information necessary to prove an infringement.

2. The rights of defence of the parties concerned shall be fully respected in the proceedings. They shall be entitled to have access to the file, subject to the legitimate interest of undertakings in the protection of their business secrets. That legitimate interest may not constitute an obstacle to the disclosure and use by the Commission of information necessary to prove an infringement. ***A penalty may not be imposed on the basis of a document that the accused has not had an opportunity to challenge.***

Justification

Strengthens the defence rights and safeguards in proceedings.

Or. es

Amendment 28

Article 26, paragraph 2, subparagraph 2

The right of access to the file shall not extend to confidential information and internal documents of the Commission or the competition authorities of the Member States. In particular, any correspondence between the Commission and the Competition Authority of the Member States, or between the latter, *inter alia*, documents drawn up pursuant to Articles 8 and 11 are excluded.

The right of access to the file shall not extend to confidential information and internal documents of the Commission or the competition authorities of the Member States ***with the exception of the conclusions of the Hearing Officer, which shall be disclosed to the parties.*** In particular, any correspondence between the Commission and the Competition Authority of the Member States, or between the latter, *inter alia*, documents drawn up pursuant to Articles 8 and 11 are excluded.

Justification

The same individuals in the Commission are responsible both for drafting and approving the case against a company – the statement of objections – and for drafting and approving the decision in which the Commission determines whether the criticisms made have been sufficiently proved. This criticism of the Commission’s procedure, i.e. that it acts as ‘both prosecutor and judge’, has so far been met only by appointing one Commission official, the Hearing Officer, who is the only official not involved in preparing the statement of objections and therefore the only one who can be relied on to consider the draft decision, and the evidence for it, objectively. However, the Hearing Officer’s conclusions on the draft decision are never disclosed to the companies to which the decision is to be addressed. This means that the Hearing Officer, however independent he or she may be, cannot provide an effective safeguard for the right of the companies to an objective assessment of the evidence, because the conclusions of the Hearing Officer can be overridden or disregarded by the Commission without difficulty or inconvenience. The conclusions of the Hearing Officer are not even given to the Court of First Instance. As far as Parliament is aware, the Commission is the only competition authority in Europe in which the only independent and objective assessment of the authority’s final decision is not disclosed to the parties. If this defect were corrected, this would go a long way to persuade the companies which appear before the Commission that their arguments are objectively listened to and considered fully and fairly. This will be necessary if the Commission’s decisions are to inspire the confidence which they should inspire.

Or. en

Amendment 29 Article 26, paragraph 3

3. If the Commission or the competition authorities of the Member States consider it necessary, they may also hear other natural or legal persons. Applications to be heard on the part of such persons shall, where they show a sufficient interest, be granted.

3. If the Commission or the competition authorities of the Member States consider it necessary, they may also hear other natural or legal persons. Applications to be heard on the part of such persons shall, where they show a sufficient interest, be granted ***as interested and be considered as part of the procedure.***

Justification

Strengthens the defence rights and safeguards in proceedings.

Or. es

Amendment 30
Article 26, paragraph 3 a (new)

3a. The total duration of the case shall not exceed two years. This time-limit may only be extended on exceptional, duly reasoned grounds. Unjustified delays caused by the parties shall be deemed to be an exceptional ground for extending the time-limit.

Justification

Strengthens the defence rights and safeguards in proceedings.

Or. es

Amendment 31
Article 27, paragraph 2 a (new)

2a. Anyone who fails to fulfil the duty of secrecy shall incur the relevant liabilities and shall be punished in accordance with the provisions of the law that proves applicable.

Justification

If an obligation is established there must be a penalty for the case of non-compliance, as it would otherwise be merely a moral obligation.

Or. es

Amendment 32
Article 28, paragraph 2 a (new)

2a. The Commission may also adopt implementing guidelines to clarify the rules in the exempting regulations.

Justification

There must be provision for adopting guidelines with the same consultative procedures as the regulations.

Or. es

Amendment 33
Article 28, paragraph 4

4. Before adopting an exemption regulation, the Commission must publish a draft thereof and invite all interested parties concerned to submit their comments within the time-limit it lays down, which may not be less than one month.

4. Before adopting an exemption regulation ***or guidelines***, the Commission must publish a draft thereof and invite all interested parties concerned to submit their comments within the time-limit it lays down, which may not be less than one month.

Justification

There must be provision for adopting guidelines with the same consultative procedures as the regulations.

Or. es

Amendment 34
Article 28, paragraph 5

5. Before publishing a draft exemption regulation and before adopting such a regulation, the Commission shall consult the Advisory Committee on Restrictive Practices and Dominant Positions.

5. Before publishing a draft exemption regulation and before adopting such a regulation, the Commission shall consult the Advisory Committee on Restrictive Practices and Dominant Positions. ***The same consultation shall take place in the event of publication of guidelines.***

Justification

There must be provision for adopting guidelines with the same consultative procedures as the regulations.

Amendment 35
Article 34, introductory part and paragraphs (a) and (b)

The Commission shall be authorised to take such measures as may be appropriate in order to apply this Regulation. The measures **may** concern *inter alia*:

- (a) the introduction of a registration requirement for certain types of agreement;
- (b) the form, content and other details of complaints lodged pursuant to Article 7 and the procedure for rejecting complaints;

The Commission shall be authorised to take such measures as may be appropriate in order to apply this Regulation. The measures **shall** concern *inter alia*:

- (a) the introduction of a registration requirement for certain types of agreement;
- (b) the form, content and other details of complaints lodged pursuant to Article 7 and the ***time-limit and*** procedure for rejecting complaints; ***the proper formalities for complaints; the Commission's official action, the statement by interested persons and the various rights granted to them;***

Justification

It is argued that authorising the Commission to adopt procedural rules should include a mandate for an authentic procedural rule, in accordance with the European Parliament's resolution A5-0069/1999 on the White Paper.

Amendment 36
Article 34, paragraph (b a) (new)

(b a) the various stages of the procedure: presentation of charges, hearing of the interested persons, period for evidence and the decision stage;

Justification

See the justification to Amendment 35.

Amendment 37
Article 34, paragraph (c)

(c) the practical arrangements for the exchange of information and consultations provided for in Article 11;

(c) the practical arrangements for the exchange of information and consultations provided for in Article 11 ***and the method of notifying the interested persons;***

Justification

See the justification to Amendment 35.

Or. es

Amendment 38
Article 34, paragraph (d a) (new)

(da) arrangements for taking statements from witnesses.

Justification

See the justification to Amendment 35.

Or. es

Amendment 39
Article 36

The Member States shall designate the competition authorities responsible for the application of Articles 81 and 82 of the Treaty, and shall take the measures necessary to empower those authorities to apply those Articles before ***.

The Member States shall designate the competition authorities responsible for the application of Articles 81 and 82 of the Treaty, and shall take the measures necessary to empower those authorities to apply those Articles before ***1 January 2003.***

Justification

To establish a sensible period for designating the national competition authorities.

Amendment 40
Article 41a (new)

The operation of this Regulation shall be subject to regular review and, in particular, a special annual report on its operation shall be submitted to the Council and the European Parliament for the first time on [eighteen months after the date for its first application].

Justification

Self-explanatory.

Amendment 41
Article 42, paragraph 2

It shall apply from **xxx**.

It shall apply from **1 January 2003**.

Justification

In order to make the Regulation's entry into force coincide with the date on which the Member States must designate the authorities responsible for applying European competition law.

Amendment 42
Paragraph to be added to the motion for a resolution

Calls on the Commission to propose, either in the framework of the Schumann project or any other, a programme for the continuing training and education in Community competition law of national judges and officials of national competition authorities, in pursuit of the principle of the uniform application of Community law;

Justification

The aim of uniformity of Community competition law must be paramount. This amendment reflects the Opinion of the Committee on Legal Affairs and the Internal Market of 9 October 2000.

Or. en

Amendment 43

Paragraph to be added to the motion for a resolution

Urges the institutions and the Member States to give careful consideration to amending Articles 229 and 230 of the EC Treaty with a view to giving the Court of First Instance the power to conduct judicial review of findings and orders made by the Commission in its competition decisions to a standard sufficient to satisfy the requirements of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; likewise calls on the Commission to do whatever is necessary, in cooperation with the national authorities, to ensure that the application of Community competition law by national competition authorities is in all respects clearly in accordance with Article 6 of the European Convention;

Justification

The issue of the compatibility of the Community's competition procedure as a whole with Article 6 of the ECHR will be particularly important if, as seems probable, the fines which can be imposed by the Commission come to be regarded as criminal penalties for the purposes of Article 6. But even if this does not come about, it is already clear that Commission competition decisions determine the 'civil rights and obligations' of companies in very important ways. Therefore companies are entitled under Article 6 to 'a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law' in Community competition cases. The European Commission could not be regarded as a 'tribunal', and its procedures are not in public. In addition, it is open to question whether it could be considered 'independent' for this purpose, because essentially the same individuals

are responsible both for making the case against a company and later for deciding whether that case has been sufficiently proved.

It follows that if Community competition procedures are to comply with the ECHR, they must do so because the Court of First Instance provides the hearing required by Article 6. Insofar as Community fines are concerned, the Court has 'full jurisdiction' and this is certainly all that Article 6 requires. However, all the other findings and orders made by the Commission in its competition decisions are subject only to the considerable but nonetheless limited degree of judicial review on the four grounds set out in Article 230 of the EC Treaty. The Court of First Instance undoubtedly goes a long way to inquire into and reconsider the Commission's findings of fact and economic assessments when it thinks it appropriate to do so. The Court does, however, recall that it defers to the Commission's economic assessments unless they are clearly incorrect or have been reached after procedural errors. It is therefore not completely certain that the Court can, consistently with the terms of Article 230, provide as full a re-hearing as might be thought necessary to fulfil the requirements of Article 6 of the Convention. No doubt the Court of First Instance will do everything it can to make sure that its review does not fall short of the standard required by Article 6. However, to resolve doubts, the possibility of amending Articles 229 and 230 should be considered.

Similar issues arise in all of the Member States in which competition law fines, whether for breach of Community law or of national competition law, are imposed by administrative authorities and not by courts. The Commission therefore should do whatever is necessary, in cooperation with the national authorities to ensure that the application of Community competition law by national competition authorities, in accordance with the Commission's proposals for decentralisation, is in all respects clearly in accordance with Article 6 of the ECHR.

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