International Chamber of Commerce
The world business organization

Policy statement

European Commission White Paper on the modernization of the rules implementing articles 85 and 86 of the EC Treaty

Commission on Law and Practices relating to Competition, 29 September 1999

Summary of ICC position

The White Paper has met with considerable interest and received a cautious and, from some, a very reluctant welcome. Some reject it outright, none support it without qualifications. There are some who think that the old system could be improved through better use of existing and the provision of new resources, but they are a minority.

The rationale of the proposals is well understood, but there is a strong feeling that their implementation may lead to a situation which could be unsatisfactory in other ways. Some also feel that the proposals are so far-reaching as to necessitate a change of the EU Treaty instead of a mere passing of regulations.

The present regime has been much criticized, and the European Commission is not entirely without blame in bringing about this state of affairs. Lack of resources has been a problem, but also the wide interpretation of Article 81. This left companies with little choice but to notify a great number of agreements, thus aggravating the workload of DG IV.

The views of a strong majority within ICC can be summarized as follows:

a) It is worthwhile to discuss the White Paper in all its detail, and more clarity is needed in some respects, but the final outcome should be a modification of the original concept.

b) This regards particularly the issue of legal security for agreements which do not fall under a block exemption but are economically important for the parties.

c) The decentralized application of Art. 81.3 by national competition authorities gives rise to criticism on the grounds that it would lead to forum shopping by applicants and plaintiffs, and to incoherent and diverging practices of the various authorities. A clear allocation of cases between the Commission and the national authorities should be considered as well as rules determining the competence of the various national authorities.

d) The problems will become even more acute, if hundreds of courts in EU countries are given the right to apply Art. 81.3. One remedy could be the assignment of competition cases to specialized courts, another the approximation of procedural rules. Above all, jurisdictional conflicts must be excluded which cannot be guaranteed by the Brussels and Lugano Conventions.

e) Multiple jurisdictions must be avoided as much as possible. Otherwise, it would be very difficult to give effect to the decision of one national authority or of one national court in all countries concerned.

f) Business questions the need to give the Commission additional investigative powers. From the present legal situation it is not evident that the Commission really needs additional instruments in order to conduct an effective *ex post* control.

Abolition of the notification system

The system practised today is not entirely without merits. It provides legal security in one important respect as violations of competition law cannot be fined when an agreement has been notified. To a

International Chamber of Commerce
38 Cours Albert 1er, 75008 Paris, France
Tel +33 (0)1 49 53 28 28 Fax +33 (0)1 49 53 29 42
E-mail icc@iccwbo.org Website www.iccwbo.org

lesser degree, such security is also obtained by a comfort letter which cannot preve nt attacks on the validity of an agreement but gives at least some protection when it comes to litigation.

Nevertheless, some companies regard the proposal to give up the notification system with sympathy. A heavy bureaucratic and largely unnecessary burden would be lifted and valuable resources of companies, and also of the Commission, freed for better purposes.

However, freedom is never without risk. Companies would have to decide for themselves whether an agreement fulfills the requirements of Art. 81.3. Errors can be costly, and it should not be surprising that industry would like to have some security for their more important contracts.

In this regard, ICC recommends that careful attention be given to three issues:

a) The scope of new block exemptions which are announced in the White Paper should be as broadly defined as possible. In addition, the rules should be much less complicated than they are today when companies cannot do without expert advice.

b) As automatic immunity from fines will disappear with the notification requirement, companies fear that the slightest misjudgement may lead to the imposition of a fine. Smaller companies in particular will not be able to have all their contracts scrutinized by legal counsel and this omission should not *per se* be construed as negligence which must be penalized by fines. More generally, fines should be limited to very serious breaches of the law.

c) The concept of "positive decisions" should be enlarged into a system of optional notification. This safety valve would be helpful for agreements in the grey area of uncertainty where the market share thresholds of block exemptions are exceeded, and the economic significance of a contract for the parties involved or the difficulty of the legal questions could make it desirable to obtain some clearance from the Commission.

- It should be possible to find suitable criteria for such optional notifications. They could include the amount of investment intended, the number of countries concerned, the nature of the restrictions, and the threat of litigation. The procedures should be precisely defined and include deadlines. Moreover, a decision could be based solely on information provided by the parties and the exemption would be lost if the parties had failed to produce the full facts and arguments.

- It needs to be underlined that any such "positive decision" of the Commission should bind the Member State.

- A system of that kind would enjoy wide support and alleviate the preoccupations of many critics.

Application of Art. 81.3 by national authorities
Decentralization is now in vogue and subsidiarity a major principle of EC Law. This has its advantages, but one of the strengths of the present centralized system has been the development of a coherent and comprehensive competition policy guided not by national interest but by European considerations. There is a grave danger that this will be changed for the worse by giving national authorities the competence to apply Art. 81.3.

We do not share the view of the Commission that cooperation through a network of these authorities under the leadership of DG IV will avert such perils. Industry sees the need to complement this rather informal arrangement by other measures if a coherent administration of Art. 81 is to be assured.

Conflicts will arise between the Commission and national authorities. They would have to be submitted to the Court of First Instance as the appropriate jurisdiction.

The internal market is still not complete, and some national authorities are better equipped and more experienced than others. The accession of new countries to the EU will accentuate these differencies which it will take years to level. This invites forum shopping and unequal application of Art. 81.

We believe that such an undesirable development must be prevented and make some recommendations:

a) Clearly, as a first step national competition laws would have to be even more closely aligned to any new EU regime. Countries would have to give up their own notification systems or they would be swamped by applicants seeking legal security which may not be provided by Brussels any more.

b) Forum shopping should be avoided by clear rules on the allocation of cases between the Commission and national authorities, subject to judicial review. Industry is opposed to the Commission exercising discretion as to whether it wants to decide a specific case or whether it delegates it to one of several national authorities. Some have suggested an allocation system based on turnover whereby the Commission would deal with the larger cases and national authorities with the smaller ones. It may seem a crude system but is one that nevertheless works well for merger control.

c) It is vital that the decision of a national authority has binding effect throughout the EU and that the Commission defines procedures which guarantee uniformity within the EU. Otherwise, an agreement could be attacked simultaneously or successively in different jurisdictions until the complainant is successful in one country which would, in most cases, in practice terminate the agreement also for the other countries.

Application of Art. 81.3 by national courts
National courts can today apply Art. 81.3 only within narrow confines when there is no doubt that an agreement fails to meet the exemption requirements. It seems only a small technical step to give national courts permission to apply Art. 81 in its entirety, but the practical consequences can be far-reaching when every civil court in the EU is deemed to be competent to balance the economic benefits of an agreement against its restrictive effects. We doubt whether national courts are adequately equipped for this task.

We fear that, because of the great number of courts, the incentive for forum shopping will be overwhelming. As with national authorities, incoherence in the application of EC law is another danger.

Some remedies are essential to minimize conflicts:

a) When considering the criteria of Art. 81.3, courts will be asked to exercise their economic judgment to a far greater extent than in most other civil cases. Some countries have found it to be an advantage if only a few courts are given the competence to deal with competition litigation. This encouraging experience should be followed in an y decentralized system.

b) Consideration should be given to the extent to which differences between national procedural laws can give rise to diverging decisions. One example may illustrate this point: courts in many countries have only limited powers of investigation in civil matters and must therefore base a decision on the facts as presented by the parties. This could lead to exemptions which would not stand up under a full and close investigation.

c) Some but not all jurisdictional conflicts are solved by the Brussels and Lugano Conventions. In particular, successive attacks on an agreement in several jurisdictions remain possible. It may be necessary to draw up additional rules for competition cases.

d) It is a serious matter that all these measures, difficult to implement, will still not prevent diverging decisions. For obvious reasons this causes concern to companies, even more so as the remedies advanced by the Commission are not seen as satisfactory solutions. Guidelines by the Commission on the application of Art. 81.3 will at best be taken into account by judges but do not bind them. A preliminary ruling by the European Court of Justice takes so much time that this route must be reserved for special cases.

Ex post control
This is an area which has to be looked into with a great amount of care. Under the new system the Commission would have its hands free to investigate sectors of industry more thoroughly, and it is understandable that it wishes its powers to be increased. On the other hand, the rights of the presumed innocent must be protected and the safeguards established by ECJ jurisprudence be respected: due process, fairness, legal privilege, no self-incrimination. In this respect, we question the proposal to interrogate company representatives or staff not directly connected to a specific case in the course of any investigation. Furthermore, we recommend harmonization of investigation powers and procedure within the EU.

In any case, the competences for ex post control should be governed by clear rules: companies should not be exposed to parallel proceedings, by the national authority and, in addition, by the Commission.

Final remark
To reiterate our fundamental position:
The White Paper contains features which are appealing to some, notably the abandonment of the notification system in its present form. At the same time, this proposal and the decentralized application of Art. 81.3 by national authorities and courts raise so many questions that at present only a compromise between the radical suggestions of the Commission and the old system is likely to be accepted by the business community.

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