



DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

COMMISSION WHITE PAPER ON THE REFORM OF COMPETITION LAW ENFORCEMENT RULES

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INTRODUCTION

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The European Commission recently adopted a White Paper on Modernization of the Rules Implementing Articles 81 and 82 of the Treaty (the "White Paper"). If implemented, the proposals would substantially change the enforcement of EC competition law, leading to:

1) End the current notification and exemption system for restricted agreements and practices.

2) Effective decentralisation of enforcement.

3) Increased enforcement at Community level.

The White Paper contemplates that national competition authorities and national courts should not only be able to apply Article 81 (1) but also to grant exemptions under Article 81 (3). In particular, the White Paper examines:

- the functioning of the current enforcement system for EC Competition Law and the need for reform;
- the objectives of the proposed reform;
- the principal options to achieve these objectives;
- the proposed amendments to Regulation 17 and new policies that would be necessary to ensure the success of the reform;
- possible transitional arrangements;

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The current system of enforcement and the need for reform

Council Regulation 17/62 enforced a system of EC Competition law based on the direct applicability of the prohibition on restrictive agreements and practices contained in Article 81 (1) EC, the prior notification of restrictive practices to the Commission, and a system of exemption by the Commission under Article 81 (3). This centralised system was necessary at the time to allow the development of a coherent competition policy.

The White Paper asserts that with the continuous expansion of the EU and the development of an extended number of competition laws and policies such centralised enforcement system can no longer be justified. Therefore, the Commission proposes that the burden of EC Competition enforcement be shared with the Member States, allowing the Commission to focus its activities on the most important cases.

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The objectives of the proposed reform

The Commission's proposed reforms are motivated by the need to ensure effective supervision of EC Competition policy and to simplify the current enforcement system.

The White Paper represents a response to the perception that the current system of notification and exemption of restrictive practices under Regulation 17 has not well served the Commission or the notifying undertakings, particularly in recent years.

Also, in the light of the fact that the geographic borders of the Community are due to expand, the Commission proposes that the national authorities and national courts apply competition

rules directly. This would require the abolition of the Commission's exclusive jurisdiction to grant exemptions pursuant to Article 81 (3).

Lastly, the current system of notification imposes considerable burdens on the notifying parties, who should not necessarily be required to obtain prior validation of their restrictive practices from administrative authorities. This system could be replaced by a system of ex post control where action would only be taken against those practices that infringed Article 81 (1) and did not meet the conditions for exemptions under Article 81 (3).

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The available options

The Commission considered the following proposals for improving the current authorisation system for restrictive practices:

- Adoption of a rule of reason approach.
- Application of Article 81 (3) by national Competition Authorities.
- Broadening the scope of retroactive exemption for agreements.

- Simplification of Regulation 17

but concluded these options would neither free the Commission's resources to concentrate on most serious infringements nor reduce the number of notification. Also, the Commission considered that its exclusive power to grant exemptions under Article 81 (3) represents a major obstacle to decentralisation of the application of competition law.

Therefore, the commission preferred option is to move to a directly applicable exception system allowing ex post supervision of restrictive practices.

Under a directly applicable exception system, restrictive practices would no longer have to be notified to be validated: restrictive practices that satisfied Article 81 (3) would be valid from the date of their adoption. Supervision of restrictive practices would take place ex post: any administrative authority could carry out a full assessment of restrictive practices both under 81 (1) and 81 (3) which would become a directly applicable provision that undertakings could invoke before national courts and national competition authorities.

In addition, the Commission proposes that national authorities and Courts would play a greater role in the implementation of competition law and that there would be an intensified ex post control by the Commission. The ending of the Commission's monopoly on the application of Article 81 (3) would mean that national competition authorities would be entitled to withdraw the benefit of a block exemption for a particular agreement in their territory.

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Consistent Enforcement of Competition law

Under the proposed system, both the Commission and the national authorities would be able to refer investigations to each other.

In order to ensure the consistent application of the EC competition rules and to preserve the unity of competition policy, Regulation 17 will be amended to permit national authorities and national courts to inform the Commission of cases in which they apply Article 81 and 82. In the case of national competition authorities, the Commission should be informed of any proceedings under Articles 81 and 82 and of any intention to withdraw the benefit to a block exemption. Lastly, the Commission's right to withdraw cases from national competition authorities, in particular where there was a risk of incoherent application of the rules would be maintained.

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Intensified ex post control

Along with the introduction of a directly applicable exception system, the Commission proposes a number of amendments that would affect its power of enquiry, ability to deal with complaints, and the system of penalties.

The Commission has advanced three principal proposals to strengthen its power to investigate undisclosed restriction of competition.. Commission officials could in the course of an investigation ask an undertaking staff any question justified by or related to the investigation and to demand full and precise answers, and draw up minutes that could be used as evidence at later stage of the procedure. Also, the Commission is proposing that it be allowed to summon any person likely to be able to provide information that may be helpful to its investigation. Interestingly, none of these proposals would provide for in-house counsel privilege.

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Conclusion

The White Paper proposes extended reforms to address the perceived pitfalls of the current notification and exemption system through the introduction of a more flexible and decentralised approach to dealing with restrictive agreements and practices. National authorities would play a significant role in the application of competition law whilst the Commission should be able to effectively concentrate on more serious restrictions of competition.

Legal certainty could be sacrificed under the new system. Undertaking would not always be able to receive a Community-wide clearance and immunity from fines. Also, there could be great difficulty in maintaining consistency of approach between the Commission and national authorities and between national authorities themselves, though consistency should in principle be ensured by the cooperation mechanism envisaged by the Commission. Lack of consistency could encourage undertakings to notify and seek exemption in the jurisdiction(s) where they could expect a more favourable treatment (forum shopping).

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