

European Commission Proposes New Rules to Implement EC Competition Law.

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[1] On September 27, 2000, the European Commission adopted a proposal for a new Council Regulation implementing Articles 81 and 82 of the EC Treaty, i.e. the EC competition rules on restrictive agreements and abuse of dominant positions. The proposed new regulation is to replace Regulation 17, in force since 1962. According to Competition Commissioner Mario Monti, this is the most important legislative initiative in the competition field since the adoption of the Merger Regulation in 1990. If it comes into force it will considerably change the way European competition law is applied outside the fields of merger control or state aids.

[2] In line with the Commission's White Paper on the modernization of antitrust enforcement (issued in April of 1999 and since then discussed with competition practitioners, the business community and the European Parliament) the draft regulation proposes to replace the existing centralized notification system with a so-called "legal exception" system. Under Article 81 EC, agreements among companies as well as concerted practices restricting competition are prohibited and automatically void, unless an agreement qualifies for an exception to the general prohibition pursuant Article 81 (3). Such exception is only possible if the four conditions of that paragraph are met: the agreement must be necessary to achieve certain positive effects that are also beneficial for consumers. In the current regime under Regulation 17, in order to qualify for an exception under Article 81 (3), an agreement only has to be notified to the European Commission. The Commission has the power, on such a case-by-case basis, to grant the requested exception unless the agreement falls within the scope of one of several predetermined "group exceptions" (e.g. for R & D agreements or car dealership agreements or other so-called "vertical agreements" between firms operating on different levels of the production and distribution chain). The imminent change to the anti-trust rules and the attendant uncertainty has led to an enormous overload of notifications to the Commission under the old procedures, most of which do not lead to an actual investigation of the case by the Commission but are resolved with so-called "comfort letters" which simply state that, in the view of the Commission's Directorate-General for Competition the agreement seems to qualify for an exemption, and that the Commission is closing its file.

[3] Under the new system proposed by the Commission, all agreements fulfilling the rather broadly worded criteria of Article 81(3) would be automatically exempted from the prohibition of Article 81(1), making individual exemption decisions by the Commission unnecessary. This means that companies could themselves assess the legality of their agreements and that Article 81 in its entirety, including the prohibition in Article 81(1) as well as the exception to the prohibition in Article 81(3), could be directly applied by courts and competition authorities in all 15 member states of the EU.

[4] The draft regulation also contains a provision declaring that agreements and practices falling within the scope of Articles 81 and 82 (affecting the trade between member states, for example) may only be assessed under the Community competition rules with the exclusion of national competition legislation. Such a proposal was not contained in the 1999 White Paper.

[5] The Commission's proposal does not address the regime for the control of mergers under Council Regulation 4064/98. The Commission's proposal also does not address the rules governing state aids.

[6] With its proposal, the Commission intends to strengthen competition by decentralizing the application of the competition rules and enabling the Commission to concentrate its resources on the persecution of the most serious restrictions and abuses, especially the so-called "hardcore cartels" (agreements fixing prices or dividing markets), while at the same time easing the administrative burden on business, which in the future will not be required to file notifications in order to get an exemption under Article 81(3). The proposal excluding agreements and practices falling under the EC rules from the application of national legislation seeks to create a more "level playing field" for the business community within the EU.

[7] The Commission proposal has provoked a strong debate among competition law practitioners and academics in Germany, some of whom believe that granting business the permission to "self-assess" the legality of restrictive agreements might turn the clear prohibition contained in Article 81 EC into a pure "abuse system" in which restrictions of competition are legal and enforceable unless expressly declared illegal by a competition authority or court. In spite of this criticism from some sectors of the German academic community, the German Federal Government, seconded by the Bundeskartellamt (Federal Cartel Office, the German antitrust authority), has declared its support for the basic principles of the Commission's proposals, while at the same time trying to obtain some clarifications and improvements in the course of the legislative process. However, both the Federal Government and the Federal Cartel Office strongly oppose the provision in the Commission proposal that holds that domestic, national law will no longer

apply to agreements and practices falling within the scope of the EC competition rules. The criterion “affection of trade between member states” in Articles 81 and 82 of the EC law is interpreted very broadly by the European Court of Justice and the Commission. The German authorities are concerned that application of this broadly defined standard would, aside from purely local markets, leave nearly no restrictive practices of any importance to be subject to the rules contained in Germanys Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen, GWB) of 1958, which was amended and modernized in 1998.

[8] The proposed regulation is now under discussion in the EU Council of Ministers.

For more information:

The Commissions draft regulation and related press release, the 1999 White Paper as well as existing legislation and case-law in the field of European competition law can be found on the website of the Commissions Directorate-General for Competition: <http://www.europa.eu.int/comm/competition>>www.europa.eu.int/comm/competition

For a critical viewpoint on the Commissions White Paper, see Ernst-Joachim Mestmäcker, *Europäische Zeitschrift für Wirtschaftsrecht (EuZW)* 1999, 523.

For information on German competition law and practice, including the text of the GWB, see the Bundeskartellamt website: <http://www.bundeskartellamt.de>>www.bundeskartellamt.de