WHITE PAPER

on

REFORM OF REGULATION 17

Summary of the observations

29.02.2000
1. **INTRODUCTION**

The White Paper was published on 28 April 1999. Interested parties have been invited to submit comments by 30 September 1999.


On 25 February 2000, the Commission had received:

- Submissions from 14 Member States;
- 104 formal position papers from third parties including submissions from EFTA countries, ESA and competitions authorities from Estonia, Hungary and the Czech Republic (see annex for detail). In addition, the Commission has collected numerous papers presented at conferences. These are also taken into account in this summary.

The present report presents the main arguments put forward. It is only a summary of the observations.

2. **OPTIONS OTHER THAN THE LEGAL EXCEPTION SYSTEM**

2.1. **Improving the current centralised authorisation system**

*European Parliament and Economic & Social Committee*

Neither the European Parliament nor the ECOSOC are in favour of improving the current authorisation system. They consider the reform urgent and necessary and welcome the Commission’s proposal.

*Member States, EEA States and ESA*

None of the Member States is in favour of keeping the current centralised system. There is agreement on the need for reform and for a greater involvement of Member States in the application of the EC competition rules. Procedural improvements are not considered sufficient to eliminate the need for reform.

*Industry & lawyers*

A majority of the submissions welcome the Commission’s proposal and consider that the current system has to be abandoned.

Less than one third of the submissions are in favour of maintaining and improving the current system. These submissions consider that the best solution would be to improve the current authorisation system without giving competence to national authorities to apply Article 81(3). In their view the aim should be modernisation rather than decentralisation. They stress the merits of the current system and indicate that one of the principal advantages
is the avoidance of private actions before national courts and national competition authorities.

Various contributions put forwards minor amendments that could speed up proceedings and provide undertakings with more legal certainty. It is for example proposed to set a threshold below which agreements would be deemed not to have an appreciable adverse effect, to introduce an opposition procedure, to reduce the number of languages and to make comfort letters binding.

2.2. **Decentralising the notification and authorisation system**

*European Parliament and Economic & Social Committee*

The European Parliament rejected an amendment proposing to explore the possible decentralisation of the notification system towards national competition authorities.

The ECOSOC has also rejected this option considering that it would be more of a burden than a help. It would not reduce the overall number of notifications and would raise difficult problems of division of competences. It would therefore not allow all competition authorities to focus on the most important cases.

*Member States, EEA States and ESA*

There are only two Member States in favour of a system in which the authorisation system would be decentralised to national competition authorities. They suggest to combine this reform with a simplification of procedures (e.g. the introduction of opposition procedures) and an extension of block exemption regulations.

Six Member States have explicitly stated that they would oppose such a reform. EEA States have also explicitly opposed this option, considering that it would reduce the national competition authorities’ ability to pursue a rigorous enforcement policy.

*Industry & lawyers*

There is no substantial support for this option from the side of industry: less than 10% of the observations support such a system and around one third explicitly opposes it. Industry fears that this option would lead to multiple notifications and increase the bureaucracy inherent to the current notification system.

2.3. **The extension of Article 4(2) of Regulation 17**

*Member States, EEA States, ESA*

None of the Member States proposes to extend Article 4(2) to horizontal agreements, as such or combined with decentralisation towards Member States. The submissions dealing with this option consider that, although it would certainly help reducing the number of notifications, it would not be sufficient to solve the problems inherent in the current authorisation system.
Industry & lawyers

Arguing that the main objective of the reform is to reduce the workload of the Commission, a small number of observations put forward a combination of Article 4(2) and rule of reason or a combination of 4(2) with decentralisation towards national authorities. These submissions stress that this would reduce considerably the number of notifications and enable therefore the Commission and national authorities to focus on those agreements that are most likely to have an overall negative impact on competition.

2.4. Rule of reason

Member States, EEA States and ESA

Several Member States welcome the Commission’s intention to adopt a more economic approach while not considering that this could go as far as applying a fully fledged rule of reason inside 81(1).

Industry and lawyers

Some observations argue that part of the current problem is caused by an excessively broad interpretation of Article 81(1) and welcome the Commission’s intention to adopt a more economic approach. In some of these observations, it is claimed that a rule of reason approach would reduce the number of notifications and that the Commission should assess the impact of this policy change before making more radical proposal for reform.

2.5. Other options

Industry & lawyers

A number of other options have been put forward in the submissions of third parties. The two most developed are the following:

One proposal is to create a system of provisional validity. Undertakings would notify an agreement to the Commission, which would have 28 days to decide on whether or not the agreement is considered problematic. Implementation within the 28 days would be at the undertaking’s risks. If no unfavourable answer is sent within 28 days, the agreement would enjoy provisional validity both in public and private law until the Commission adopted a prohibition decision. This system could be combined with a decentralisation of the authorisation system to national competition authorities.

Another proposal is to establish a “modified authorisation system”. Undertakings could choose to notify: notified agreements would be presumed legal whereas agreements not notified would be presumed illegal. Both presumptions could be rebutted with retroactive effect. National courts could also apply article 81§3: either themselves or they could force undertakings to notify to the Commission. In any event, they would have to inform the Commission.
3. COMPATIBILITY OF THE LEGAL EXCEPTION SYSTEM WITH THE TREATY

3.1. Overview of positions

*European Parliament and Economic & Social Committee*

The VON WOGAU report mentions that the jurisconsulte of the Parliament has issued an opinion, considering that a directly applicable exception system is compatible with the Treaty. The resolution takes the view that the reform proposed in the White Paper is compatible with the existing provisions of the EC Treaty.

The ECOSOC also considers that the proposed reform is compatible with the Treaty.

*Member States, EEA States and ESA*

While most Member States have not expressed any doubts about the compatibility, two Member States argue that the proposal would require amendment of the Treaty. One Member State expresses doubts as to the compatibility of the proposal with the Treaty.

*Industry and others*

Few respondents explicitly address the issue of compatibility. The respondents consider either that the Commission’s proposal is incompatible with the Treaty or that the issue is doubtful.

3.2. The main arguments

The proponents of compatibility essentially reiterate the arguments contained in the White Paper, i.e. that Articles 81(3) and 83 leave open the possibility for the Council to establish either an authorisation system or a system based on a directly applicable legal exception.

Those that argue against compatibility essentially draw on the submissions of the German Monopolkommission, which can be summarised as follows:

- The proposed change goes beyond the system established by the Treaty. Article 81(3) requires a declaration of inapplicability which presupposes an authorisation system based on constitutive acts, implying that following the declaration the agreement in question is valid *erga omnes*. This is not possible in a directly applicable system. The argument based on the legislative history is considered to be indeterminate.

- The fact that group exemption regulations must be limited to categories of agreements means that a global exemption cannot be issued. The effect of the legal exception rule – according to which all agreements that fulfil the conditions of Article 81(3) are valid from the outset – would have the effect of a global block exemption regulation.

- Article 81(3) does not fulfil the general criteria for direct effect, i.e. it is not sufficiently clear and precise and unconditional. It presupposes complex economic analysis, which courts are unable to carry out. This is
the very reason for the monopoly and the reason why the Court of Justice has granted the Commission a wide margin of appreciation in the application of 81§3.

– The Commission has previously acknowledged that Article 81(3) makes it possible to have regard to non-competition related considerations, i.e. to take account of other policy aims. This would not be possible in the proposed system.

4. ABOLITION OF THE AUTHORISATION AND NOTIFICATION SYSTEM

4.1. Abolition of the authorisation system: principle of a legal exception system (protection of competition: merits of a notification system)

European Parliament and Economic & Social Committee

The European Parliament and the Ecosoc are in favour of abandoning the notification and authorisation system.

The European Parliament considers modernisation of European competition rules to be urgent, in view of the shortcomings of the existing system on essential issues and the important changes that have taken place in the real economic world and supports in principle the main points in the White Paper, including the abolition of the notification and authorisation system under Article 81 of the Treaty.

The ECOSOC stresses the advantages of the proposed system for undertakings and in particular for SMEs, as it eliminates the administrative burden imposed on them by the notification system. It states that “the elimination of the notification system signals the end of an essentially bureaucratic activity which has become a major obstacle to the efficient safeguarding of competition”. It also states that a directly applicable exception system will allow all competition authorities to focus on the most important cases.

Member States, EEA States and ESA

The proposal to abandon the notification and authorisation system is supported by twelve out of the fourteen Member States that have made observations on the White Paper. ESA and EEA Member States are also in favour of abolishing the authorisation and notification system. They consider that notification is not an effective tool for the protection of competition and that a legal exception system promotes a more efficient protection of competition.

Two Member States are opposed to abolishing the notification system, in particular for horizontal agreements and believe that such abolition would lead to a de facto control of abuse system which is less efficient in terms of protecting competition. Abolition of the authorisation system would also reduce legal certainty and therefore investments and jobs: undertakings are not able to assess themselves the legality of their agreements. These two Member States also consider that a notification system provides valuable information to the authorities (overview of the market, consistent monitoring
of practices, complaints against horizontal agreements are rare due to similar interests of the parties) as well as transparency (consumers, buyers and competitors have an interest in existing cartels being public). They stress that the experience gained through notifications helps in the elaboration of block exemption regulations. They also consider that a notification system has a preventive effect and deters the conclusion of restrictive agreements. Finally, they recall that notifications allow competition authorities to fine-tune agreements before they are implemented.

**Industry**

A large majority of the contributions from associations of undertakings are favourable to the abolition of the present authorisation system. They complain about the administrative burden of the current system and appreciate the benefits resulting from the direct application of Article 81(3). However, most of them would like to have the possibility to seek the Commission’s view in problematic cases by means of voluntary notifications or opinions (cf. infra).

A number of submissions from companies in the retail sector are opposed to abolishing the authorisation system. They consider that ex post control will encourage abuse and be detrimental to SMEs. The system proposed by the Commission would result in suppliers not having any incentive to meet any conditions concerning the economic dependence of their distributors. An even greater degree of dependence would be unacceptable and would jeopardise the entrepreneurial spirit of SMEs. It is also argued that the Commission’s proposal is disproportionate. The Merger Task Force with a relatively small staff is capable of processing a large number of notifications each year. Notifications in the area of antitrust are much less numerous and the trend is falling. New measures in the field of verticals and horizontals will reduce the number even further. It is finally argued that the proposal will lead to a shift in the burden of proof under Article 81(3) which will now rest with the Commission.

**Lawyers**

Several lawyers’ submissions recall that most companies already themselves assess the competitive impact of the agreements that they conclude. They emphasise the heavy burden imposed on undertakings by the notification system as well as the low level of legal certainty provided by the current system. The fact that under article 81(2) agreements that violate article 81(1) are automatically void gives rise to complications when in the context of private litigation a national court is requested to enforce an agreement that has been notified to the Commission and therefore may later be exempted, sometimes even retrospectively. This situation discourages companies from undertaking potentially beneficial projects that involve substantial investment. They therefore welcome the move away from a system of notification and prior authorisation.

Some lawyers, however, argue that they are not in a position to give clear advice on the fulfilment of the four conditions of Article 81(3) and point out that they are liable, if they make a wrong assessment. They consider that there is a public interest in having available adequately staffed and qualified
public agencies that are able to give reasoned decisions on the application or non application of the prohibitions contained in Articles 81 and 82 which excludes any challenge to the agreement. Inadequate resources is not an argument: an appropriate fee of e.g. 10,000 Euro could be introduced and public costs are, at any rate, lower than the expected benefit.

Most of these submissions insist on having a means of contacting the Commission in case of doubts (cf. infra).

4.2. **Derogation: production joint ventures**

*Economic & Social Committee*

The ECOSOC considers that it may be appropriate to extend the derogation to other types of agreements that also involve large sunk investments, including strategic alliances and networks of standard form agreements.

*Member States, EEA States and ESA*

Five Member States are in favour of the proposal to include production joint ventures in the Merger Regulation. Four Member States are against this proposal. They argue that it would disfigure the Merger Regulation and that it would discriminate between different kinds of operations, production joint ventures not being the only operations involving large scale investments. One Member State notes that there is a risk that many cooperation projects will be structured into a joint venture in order to benefit from the Merger Regulation.

Two Member States and EFTA States consider that it may be appropriate to extend the derogation to other types of agreements that also involve large sunk investments. Five Member States are of the opinion that the concept of production joint ventures requires further clarification.

*Industry & lawyers*

For industry, issues related to this derogation appear to be closely linked to the possibility to obtain either a positive decision or an opinion from the Commission. Many submissions question why this category is singled out, stressing that there are other operations (like R&D joint ventures or distribution systems) that require important investments and that are difficult to unravel afterwards. Some submissions are sceptical as to the appropriateness of broadening the scope of the obligation to notify: a voluntary system is favoured. Finally, some submissions doubt that it is possible to define clearly this new concept of production joint ventures, particularly in relation to service markets.

4.3. **Voluntary notification system**

*Member States, EEA States and ESA*

Two Member States specifically request that some form of voluntary notification system be retained. They are in favour of allowing undertakings to notify their agreements in the “grey zone” and obtain a positive decision
from the Commission. One Member State is of the opinion that there should be further discussion of appropriate measures to ensure legal certainty.

Seven Member States and ESA are opposed to the introduction of a voluntary notification scheme.

**Industry & lawyers**

One third of the respondents would like to have the possibility to notify their agreements to the Commission in certain circumstances in order to obtain a positive decision. They all agree that appropriate criteria would be required to limit the number of demands. The criteria most commonly mentioned are the following:

- turnover thresholds;
- clear uncertainty as to the applicability of Article 81(3) (absence of legislative measures or precedents);
- importance of the case to the parties (investment threshold);
- genuine Community interest (several Member States involved);
- non-implementation of the agreement;
- high risk of litigation.

All these undertaking insist on having streamlined procedures and tight deadlines. Some suggest that the notifications should be shared between the Commission and the national authorities on the basis of a one stop shop principle and that national decisions have a Community wide effect. They suggest various procedural simplifications such as a limitation of the number of languages and the introduction of opposition procedures.

**4.4. Positive decisions / non-infringement decisions**

**Economic & Social Committee**

The ECOSOC explicitly accepts an exclusive right for the Commission to adopt positive decisions. It is stressed that there is a need to clarify when they must be adopted, under what conditions and what their legal effect will be. Such decisions should be subject to brief procedures and have an effect *erga omnes*. In general, the ECOSOC stresses the importance of individual decisions as a basis for the preparation of general measures such as block exemptions and guidelines.

**Member States, EEA States and ESA**

Some Member States consider that only the Commission should take positive decisions on its own initiative and only in exceptional circumstances as stated in the White Paper. Three Member States consider that there is a risk that such positive decisions will pave the way for a reintroduction of the notification system. Some Member States consider that positive decisions are difficult to reconcile with a legal exception system.

Five Member State hold the view that national competition authorities should have a more general right to adopt positive decisions and that an
exclusive power for the Commission to adopt positive decisions would restore the monopoly. They insist that all files must be closed by a motivated decision and consider therefore that they need to be empowered to take positive decisions.

Four Member States are explicitly against a right for national authorities to adopt positive decisions.

Two Member States consider that it is difficult to distinguish positive decisions from other types of decisions such as rejection of complaints that may be based on Article 81(3).

Industry and Lawyers

Most undertakings consider that positive decisions, contrary to what is stated in the White Paper, should not only be taken in exceptional circumstances on public interest grounds.

Some respondents hold the view that positive decisions sit uneasily with a directly applicable exception system.

As to the value of positive decisions, some submissions analyse this issue in detail. It is argued that positive decisions would have the value of negative clearance decisions, and would therefore have no binding effect vis-à-vis national authorities and courts. The Commission, being an administrative body, could only prohibit, grant constitutive exemptions or impose fines. Whether or not an agreement is legal under Article 81 could not in itself constitute a decision but only form part of the reasoning on which the decision is based.

Some submissions question how the Commission – in light of the proposed narrow scope of application of positive decisions – will deal with cases where no infringement is found. Transparency and legal certainty requires that at least the parties are informed in an appropriate manner.

4.5. Decisions with commitments

Very few comments have been made on other types of decisions.

Concerning decisions with commitments, the Australian Competition and Consumer Council mentions its experience with this kind of instrument, which has proven to be a useful tool in furthering the goals of enhancing competition and efficiencies in markets. Enforceable commitments offer a flexible and lower cost alternative to litigation for the resolution of restrictive trade matters. They have been widely used in Australia since 1993.

One submission stresses that there should be a limit to the kind of commitments that companies offer. This limit should be based on the Commissions powers under Article 81, the need for a connection with the object of the case and the fundamental prohibition on abuse of authority. The duration of commitments should be limited to a period which is reasonably foreseeable by the Commission and by the parties. An initial time limit of five years is considered appropriate.
4.6. Opinions

European Parliament

The resolution of the European Parliament states that in cases where clarification is in the general interest, it should remain possible for undertakings to obtain advance clarification from the Commission, inter alia by means of reasoned opinions; however this procedure must be confined to exceptional cases in which doubts need to be solved. This is necessary in order to prevent the proliferation of notifications that has made the present procedure ineffective.

Member States, EEA States and ESA

Two Member States have expressed opposition to a new system similar to the current “comfort letters” that would prevent the Commission from focussing on the essentials and not give real legal certainty to undertakings. One Member State also states that if opinions are to be the exclusive competence of the Commission, the monopoly will not really be abandoned.

Two Member State considers that such a system is necessary. One Member State expressly accepts opinions as a possible substitute for positive decisions, whereas another Member State finds that such opinions could serve as a useful tool for giving guidance to industry.

Industry & lawyers

A dozen of submissions deal with the issue of opinions all of which are in favour of such a system. The main thrust of the observations is that opinions should serve as a flexible tool for giving guidance to industry in appropriate cases.

The observations of one practitioner can be summarised as follows: Opinions should be issued in cases that raise difficult competition issues that require public guidance, in particular where large investments are involved. This will allow the Commission to acquire experience that can be used in the formulation of guidelines. Certain conditions could be imposed and the company should submit a briefing paper.

Most of the submissions insisting on such a mechanism consider that opinions should not be binding on national Courts but should grant immunity from fine. They should also be published on the Commission’s web site to increase transparency. Some submissions suggest that opinions could also be given by national authorities.

These submissions consider that the reform proposed by the Commission would be acceptable to industry if such a mechanism of informal non-binding opinions were established. For others, this would be a “second best” after a system of voluntary notification.

Many submissions stress that the Commission as a public service body has a duty to provide guidance to undertakings.
5. **DECENTRALISATION TO NATIONAL COURTS**

5.1. **Overview of positions**

*European Parliament and Economic & Social Committee*

The European Parliament notes that the possibility of application of Community competition law by the Courts will give business suitable means of settling their private disputes with speed and immediacy, while allowing the Commission and the national authorities to focus their activity on the most important cases affecting the public interest.

The ECOSOC takes the view that decentralisation to national courts will substantially improve the situation for undertakings, especially for SMEs, as it will enhance the protection of undertakings that are victims of restrictive practices. It sees however certain dangers in the form of inconsistent application and invites the Commission to take necessary prior measures. These measures should include consultation of courts, training and other forms of assistance, measures to address the issue of forum shopping and measures such as notices and block exemptions to guide national courts in the application of the Community competition rules.

*Member States, EEA States and ESA*

Out of the fourteen respondents, twelve Member States are explicitly in favour of decentralisation to national courts, whereas two Member States are opposed. Some Member States as well as EFTA invite the Commission to examine certain issues related to decentralisation to national courts in greater detail.

*Industry and lawyers*

A significant majority of the responding companies and associations is opposed to decentralisation to national courts. The views amongst lawyers is more evenly divided with a majority, however, in favour of decentralisation to national courts.

5.2. **Ability of national Courts to apply Article 81§3**

The main concern with regard to decentralisation to national courts is their ability to apply Article 81(3) in a coherent and consistent manner.

*European Parliament and Economic & Social Committee*

The resolution of the European Parliament demands that competition cases be brought before specialised Courts in all the Member States in order to ensure consistency and legal certainty.

The ECOSOC is also in favour of setting up specialised courts in all Member States. It is also hoped that judgements of national courts will be open to appeal to supranational courts empowered to assess both the law and the facts.
**Member States**

The Member States which are in favour of decentralisation to national courts indicate that application of Article 81(3) by national courts would not present major difficulties. Training of national judges is, however, considered important.

The Member States that are opposed to such decentralisation argue that national courts will have difficulties in applying Article 81(3) due to the nature of their procedures and a lack of access to the necessary data. Furthermore, enforcement through national courts is considered less effective, given that judgements only have effects *inter partes* and therefore will not bind third parties.

Three Member States are in favour of establishing specialised courts.

**Industry**

Many fear that decentralisation to national courts will lead to incoherent application of EC competition law, resulting in a fragmentation of the internal market and a re-nationalisation of EC competition law. Inconsistent application is of particular concern to undertakings that operate EU-wide distribution systems, since such inconsistencies could threaten the integrity of the network. National courts often lack sufficient knowledge and are already overloaded.

It is felt that Article 81(3) requires complex economic assessments, leaving a large margin of appreciation on the part of the applying body. Some also refer to the risk that considerations of a political (industrial policy) nature are included in the assessment. The expansion to the East will only aggravate the problem.

The Article 234 procedure is not considered sufficient to ensure coherence. Some also fear that competition law would be developed by courts, leading to a loss of control and influence on the part of the Commission.

To the extent that decentralisation takes place there is a strong call for it to be limited to specialised courts in each Member State.

**Lawyers**

Some practitioners argue that national courts are incapable of applying Article 81(3) in a coherent manner. Article 81(3) requires complex economic analysis. In the past the Commission has had a significant margin of appreciation. It is not appropriate to leave this margin to generalised national courts. It should be left to competition authorities and specialised courts.

Some argue in favour of appointing a national Advocate General to assist national courts in the application of Article 81 and Community law in general.

Other practitioners welcome decentralisation to national courts. It is felt that the availability of Article 81(3) will reduce delays in court proceedings. Greater private enforcement will allow the competition authorities to
concentrate on the serious infringements. It is also stated that national courts and national competition authorities are generally better placed to assess matters that are concentrated in their particular Member State.

These respondents are of the opinion that there is no reason to believe that national courts will not be able to apply Article 81 in its entirety in a satisfactory manner. If, however, there are particular problems in certain Member States, specialised courts may be the answer.

The present division of power is considered highly unsatisfactory. The monopoly over Article 81(3) causes delay and higher costs. Application of Article 81(2) due to the lack of notification is unacceptable. Decentralisation will also avoid dual procedures – one on the basis of national law and another on the basis of EC law, as it should lead to further approximation of the overall body of competition law.

5.3. Measures proposed by the Commission

In the White Paper the Commission proposes to introduce measures to assist national courts in the application of the EC competition rules, including intervention as amicus curiae. It also proposes to introduce a general obligation on Courts to inform the Commission of their application of the Community Competition rules.

Member States

A majority of Member States has reservation about the proposal to grant the Commission a right to intervene as amicus curiae generally on grounds that it may be difficult to reconcile this intervention with the independence of national courts.

Two other Member States find that the procedure would be too cumbersome and time consuming for the Commission. One Member State suggests that it might be possible to devise a possibility for the Commission to submit comments within a certain time limit.

Four Member States support the proposed obligation on national courts to inform the Commission of all procedures involving the EC competition rules, whereas two Member States consider such an obligation too cumbersome, imposing considerable burdens on the Commission.

Industry

Few companies and associations have specifically addressed these issues. Most of them are opposed to the amicus curiae option. Some fear that it will create large new burdens on the Commission, and that it is insufficient to ensure consistency. Others consider the option problematic due to the fact that the Commission is not a party to the litigation and that the Commission is both regulator and enforcer.

It is also claimed that there is a risk that the Commission will be viewed as an independent expert and that its opinion will be given too much weight. The Commission should only act as an intervener on behalf of one of the parties.
Others believe that the courts would in practice rarely turn to the Commission, particularly on issues of law. They will rather go to the Court of Justice and refer questions on the basis of Article 234. At any rate, this is by several respondents considered the appropriate mechanism, which has ensured coherent application by national courts in other areas of Community law.

Only one respondent addresses the issue of national courts informing the Commission of procedures involving the competition rules. The view expressed is positive.

**Lawyers**

Few practitioners have submitted comments on these issues. Those that have are evenly divided.

Some welcome the *amicus curiae* option as well as the information requirement, stressing the importance of co-operation between national courts and the Commission with a view to ensuring coherence. One respondent suggests that the Commission should have a right to appeal against decisions by national courts.

Others fear that the procedures would be too cumbersome and imprecise and question whether the Commission will have the resources to carry out the necessary monitoring.

### 5.4. Forum Shopping

**European Parliament and Economic & Social Committee**

The Parliament calls for clear allocation of cases in the light of the subsidiarity principle.

The ECOSOC considers that there is a risk that inconsistencies and differences in interpretation could be exploited. There is therefore a need to prevent jurisdictional overlaps regarding individual cases. This may require harmonisation, using, where appropriate, notices, recommendations and decisions.

**Member States**

Seven Member States fear that decentralisation can lead to forum shopping, whereas three Member States do not share this view. However, few details are put forward on this issue.

**Industry and lawyers**

A number of submissions have raised the risk of forum shopping as one of the main concerns. The safeguards proposed by the Commission are considered insufficient.

The main argument is that the Commission’s proposal will lead to inconsistent application of the competition rules which in turn will foster forum shopping as plaintiffs will try to pursue their claims before the courts
that are known to apply the most strict interpretation. There is also a risk of multiple litigation, i.e. litigation concerning the same agreement or network of agreements in several Member States. These risks are considered particularly great with regard to pan-European distribution systems.

The Brussels Convention of 1968 is not considered to provide an effective remedy, because it presupposes that both the facts and the parties are the same. Furthermore, any judgement will only have effect inter partes. It is suggested that there should be a system of mutual recognition of judgements that relate to essentially the same facts, even if the parties are not the same.

It is also feared that decentralisation will encourage unnecessary and multiple litigation. Some see a risk of the proposed reform encouraging frivolous or vexatious litigation, aiming at frustrating legitimate business plans.

5.5. Impact on the European Court of Justice / Article 234 procedure

Member States

None of the Member States take an express position on the implications for the Court of Justice of decentralisation to national courts.

Industry and lawyers

A few companies and lawyers fear that decentralisation to national courts will lead to a dramatic increase in the workload of the ECJ. Some of those, however, are of the opinion that such a phenomenon will be of a transitional nature.

Others fear that the Article 234 procedure, which is considered costly and cumbersome, will be insufficient to ensure coherence. There appears to be a general feeling that the Court of First Instance is a more appropriate forum for competition cases. Some favour a system of decentralised Community courts as the most effective way of ensuring coherence.

Decentralisation also risks leading to further delays with regard to the Article 234 procedure. At any rate the Court of Justice is not considered the proper forum for competition cases. The Court of First Instance is considered a more appropriate forum.
6. DECENTRALISATION TO NATIONAL AUTHORITIES: FUNCTIONNING OF THE NETWORK

6.1. Decentralisation to national authorities: principle and possible drawbacks

European Parliament and Economic & Social Committee

Both the European Parliament and the ECOSOC are in favour of involving more national authorities in the application of EC competition law. The resolution of the European Parliament calls Member States to empower their national authorities to apply EC law as soon as possible.

Member States, EEA States and ESA

Two Member States insist on the importance of all national authorities being empowered to apply EC law. Some note that resources are very limited in several Member States.

Industry & lawyers

A number of submissions express doubts as to the capacity of national authorities to apply EC law: they consider that decentralisation will lead to a renationalisation of competition law because national authorities will take national interest into account. They fear that decentralisation could damage the internal market. They recall that more than half of the national authorities have no experience of enforcing the principles of EU competition law. They think that national authorities are less independent than the Commission and are more sensitive to political pressure. They stress the lack of resources of some of the authorities and the translation problems that will emerge in the network.

Some submissions also question the ability of the Commission to refocus its enforcement activities given the high burden of coordination work. Other consider that this coordination work is the price to be paid for a more efficient enforcement of competition law.
6.2. Allocation of cases

*European Parliament and Economic & Social Committee*

The European Parliament considers it necessary, in connection with the forthcoming reform of European competition rules, to review the principle of subsidiarity, and considers it vital, in particular, to adopt clear criteria for the allocation of cases within the network of competition authorities of the Member States.

The ECOSOC is of the opinion that the rules applying to the network should guarantee the necessary flexibility and the establishment of a genuine network, while at the same time enabling companies to know which is the responsible and competent authority. In particular it is considered important to establish a clear definition of the concept of Community interest.

*Member States, EEA States and ESA*

Member States insist on the importance of a clear system of case allocation which ensures legal certainty and avoids forum shopping but also allows a flexible cooperation between the members of the network. One Member State considers that case allocation should mainly be based on the centre of gravity criteria. Five Member States consider that multiple control should be avoided.

ESA considers that it might be appropriate to reserve the application of the competition rules to undertakings covered by Article 86CE to the Commission.

*Industry & lawyers*

Industry attaches great importance to the allocation of cases. It fears multiple control (several national authorities scrutinising the same case) and would like to have recognition of the “one stop shop” principle. It contests the discretion of the Commission to intervene or not in a given case and thinks that in certain circumstances it should be obliged to act. Several submissions would like to see the Commission as an appeal body for national decisions.

Various allocation criteria are proposed: one submission suggests that a turnover threshold linked with a two-third rule might be appropriate, another proposes to define clearer the notions of “Community interest” and “separate national market”.

Industry is also afraid of forum shopping by complainants given the differences between national procedural rules.

6.3. Territorial effect of national decisions

*Member States*

Only five Member States commented on this issue. Three Member States consider that national decisions should have a Community wide effect. Two Member States are explicitly opposed to this.
Industry & lawyers

Industry demands a Community wide effect for national decisions: its demand relates not so much to prohibition decisions but to positive decisions although the new system should only be based on prohibition decisions. Several submissions propose a system in which national authorities and the Commission could oppose a national decision within a certain period of time. If no objection is raised, the decision would automatically acquire a Community wide effect. Another option would be to provide for mutual recognition of these cases under a multilateral treaty comparable with the Brussels Convention or a regulation.

6.4. Prevention of conflicts or correction?

European Parliament

The European Parliament calls in its resolution for an intensification of the cooperation between the Commission and national competition authorities, and in this connection suggests promoting exchanges of officials and joint meetings at which it is possible to exchange opinions and experience.

Member States, EEA States and ESA

A majority of Member States express a preference for preventive mechanisms rather than corrective ones. Five Member States oppose the possibility for the Commission to prohibit an agreement that would have been authorised by a national authority. ESA also has difficulties with this proposal and considers that corrective measures should primarily be the task of the European Courts. Three Member States state that the preservation of Article 9(3) in the new system should be subject of careful consideration.

Some submissions recall that decisions are, in some Member States, taken by a collegiate body or even by a Court (in case of prohibition decisions) and that in such cases preventive mechanisms would not work.

ESA supports the proposed mechanism which would enable the Commission to withdraw a case from a national authority but suggests that the Commission provides further clarification about the situations when the Commission would exercise such a power.

Industry & lawyers

Industry considers that the Commission should be obliged to intervene when national authorities reach divergent decisions. Most of the submissions oppose the right for the Commission to prohibit an agreement that was upheld by a national authority. Some submissions propose to extend the competence of the CFI to include appeals against national decisions and conflicts between the Commission and national authorities.

One submission opposes any competence for the Commission to take a decision at any time in the case of proceedings before national authorities or courts arguing that this would imply a negative monopoly. The Commission could of course prohibit an agreement for which a national authority intends to adopt a negative clearance but a positive decision from the Commission
could not prevent the national authority/court to prohibit as it has no binding effect. It would be contrary to the goal of decentralisation if the Commission were to control all negative clearance decisions of national authorities and courts.

6.5. **Exchange of confidential information**

*Economic and Social Committee*

According to the ECOSOC exchange of confidential information must be subject to the principle that confidential evidence may only be used for the case and purpose for which it was gathered.

*Member States, EEA States and ESA*

Most of the Member States consider that national laws should be amended in order to allow both vertical and horizontal exchange of confidential information. They also consider that guaranties should be established in order to protect the confidentiality of the information exchanged.

*Industry*

While recognising that exchange of confidential information is necessary for the proper functioning of the network industry expresses concern. It points out that sanctions are different in the various Member States and that protection of the confidentiality of the information is not harmonised. It is suggested that the exchange of confidential information should be limited to persons instructing the case and not be widespread within the network. It is also insisted that the information should only be used for the purpose of which it has been collected.

There is a risk that information collected by the Commission might be used in criminal proceedings in the Member States or even in third countries (US). However, because the Commission’s investigative powers are not considered criminal in nature, defendants are not given the same procedural safeguards as regards in particular the right against self incrimination or the right of representation. These issues should be addressed. Either safeguards should be introduced so that the information collected by the Commission could be used in criminal proceedings or such information should not be used at all. Confidentiality should be protected. The issue of legal professional privilege for in-house lawyers should also be addressed.

Some submissions coming from industry require that the exchange of confidential information should be subject to the consent of the parties and that there should be a legal procedure for opposing it.

6.6. **Co-operation in the network (Advisory Committee, languages…)**

*European Parliament*

The resolution of the European Parliament emphasises that the Commission’s annual report on competition must remain the central document of Community competition policy even after the reform of the European competition system, and that the report must include all the
developments and decisions that are essential for the Community and that will take place in the Member States after decentralisation.

**Member States, EEA States and ESA**

Two Member States raise the issue of language within the network. They suggest that the information should be made available in a language understood by the other Member States.

7. **INVESTIGATIVE POWERS OF THE COMMISSION & RIGHTS OF DEFENSE**

*European Parliament and Economic & Social Committee*

The European Parliament asks the Council to adopt a new procedural regulation that will improve defence rights for the undertakings subject to proceedings, in particular as regards the definition of deadlines for procedures and access to the file. It considers that any increase in the Commission’s investigating powers should not imply a diminution in the defence rights of companies.

7.1. **Treatment of complaints**

*European Parliament and Economic & Social Committee*

The European Parliament supports the Commission’s proposal to give greater importance to complaints in the new system, and considers that the role of complainants must be strengthened in the new regulation. It considers that there is a need to make it easier for consumer associations to intervene as complainants.

**Member States, EEA States and ESA**

Two Member States welcome the Commission’s proposal to introduce a four months deadline for dealing with complaints but consider that another deadline should be created for the second phase of the investigation (or possibly between the sending of a statement of objections and the final decision).

ESA welcomes the simplification of complaints procedures but believes that it must also be possible to rely on informal complaints and that the formulation of formal complaints in each case must not be systematically encouraged. It considers that in practice compliance with the four month deadline may be difficult particularly if the complainant has not submitted sufficient information to the authority: it proposes therefore similar rules to those which apply in the field of State Aid i.e. the time limits commence only after the submission of sufficient information for the relevant authority to take position.

**Industry & lawyers**

Some contributions suggest that complainants lodging unfounded complaints should either be fined or forced to contribute to the costs incurred by their complaint.

One submission asks which sanction could be imposed on the Commission if it does not meet the four months deadline.
Several submissions of companies in the retail sector note that no reference is made to anonymous complaints submitted to the Commission. They mention that this form of complaint exists in German law and has proven to be useful: with anonymous complaints, pressure from large retailers on suppliers that they will no longer be listed or pressure from large suppliers on smaller distributors could be avoided.

7.2. Judicial control of inspections

*Member States, EEA States and ESA*

Three Member States oppose the centralisation of the judicial control which they consider to be contrary to the Treaty. Two Member States have doubts as to the need for such a reform. One Member State considers this option more realistic than an harmonisation of national laws in this respect.

*Industry and lawyers*

Some contributions from lawyers consider that there is a case for proposing such a reform but that the level of control should be higher than is presently the case. One submission argues that an amendment of the Treaty would be necessary because the intended reform would give the Commission the power to execute Community law, which is contrary to the existing principle according to which enforcement of Community law is the competence of Member States. The Community has never had the power to enforce its own decisions.

One submission suggests a “half-way-course” inspired from the procedures under the Brussels Convention. The European search warrant could be sent to the competent national courts for “registration”. Those courts could then promptly issue national warrants as appropriate.

7.3. Interim measures

*Member States*

One Member State welcomes the proposed codification and stresses the importance of interim measures.

*Lawyers*

Several submissions from lawyers suggest that the level of proof should be lowered in line with the UK competition act (reasonable suspicion and not prima facie, damage to the public interest and not serious and irreparable harm).

7.4. Oral questions

*Member States*

One Member State expresses the view that convocation of individuals to the Commission’s premises goes too far.

*Industry & lawyers*

Industry recalls that EC law recognises the right for undertakings not to be forced to answer questions that would lead them to admit an infringement and states that the
proposed changes with regard to oral questioning should not put this right into question.

Some lawyers express concerns about the proposal. First it may well be that the member of staff who is best able to provide the full and precise answer sought is not present; unfair pressure could be placed on members of the staff whose knowledge of the matters at issue is less good. Secondly, it will often be important that member of staff receive their own independent legal advice before giving answers that could be used against them in criminal trials or in internal disciplinary hearings. Thirdly, it is not reasonable in cases that are often very complex and often involve events that took place many years ago to expect individuals to give full and precise answers without having had sufficient time to prepare. Further, the cases Funke c/ France and Saunders v. UK of the European Court of Human Rights would suggest that the use of answers obtained in these circumstances against an undertaking required to produce those answers could well violate its right to a fair trial under Article 6 of the European Convention on Human Rights.

Concerning the suggestion that individuals could be summoned to the Commission’s premises, one respondent believes that such a power should only be enforceable by a fully reasoned decision that is subject to judicial review. In practice, if such a power existed, individuals will usually choose to submit informally rather than require the Commission to use its powers.

Many submissions point out that the White Paper leaves important questions to be answered: is the power to be exercised against the individual or the undertaking? In the former case, what happens if the individual does not want to go? What penalty for non compliance?

One submission draws the attention of the Commission to the importance of minutes. It considers natural that the Commission be granted not only a right but also an obligation to draw up minutes wherever information is furnished. One submission stresses that it should be clarified that the person who is required to answer has an absolute right to be assisted by a lawyer and that the questioning may not start before the lawyer is present. In this connection it should be clarified that the testifying person or his lawyer has a right to make an addendum to the minutes if there are aspects of the questioning or the content which call for remarks.

7.5. **Fining rules for associations**

**Member States**

One Member State argues that fines should be proportionate to the effective involvement of the undertakings that are members of the association. One Member State considers that the proposal of the Commission goes too far.

**Industry and lawyers**

Most of the submissions from industry oppose the Commission’s proposal, considering that the individual behaviour of each undertaking has to be taken into account in order to establish liability.
7.6. Adaptation of fines and periodic penalties

There is a widespread acceptance of this proposal. One submission regrets that the Commission has not proposed to increase the amount of fines, considering them too low to have a deterrent effect.

7.7. Legal privilege for in-house lawyers

Member States, EEA States and ESA

One Member State demands that this question be given careful consideration. One Member State points out that the non recognition of the privilege to in-house lawyers will lead undertakings to consult external lawyers and will therefore increase their compliance costs.

Industry

In-house lawyers and associations of in-house lawyers argue that the legal privilege for external lawyers should be extended to in-house lawyers. They stress that under the White Paper the role of legal advisors would greatly gain in importance as companies would not be able to notify agreements and thus rely more heavily on the advice of legal advisors. At the same time, if no privilege were recognised for in-house lawyers, the Commission would be able to ask them on the spot questions on the subject of the advice given. This cannot be in the interest of encouraging companies to comply with EC competition law. Therefore any review of Regulation 17 should include the recognition of legal privilege for in-house lawyers. In-house lawyers are said not to be less independent than external lawyers. The duty of loyalty that an employee owes to his employer cannot encompass the right knowingly to participate in illegal activities, to withhold information from the courts or authorities such as the Commission when disclosure is required or to frustrate the administration of justice. The key of “full independence” does not lie in the status of employee but in the rights and obligations as a professional to act ethically as defined in the rules of professional ethics and discipline. Recognition of the privilege would promote effective competition compliance: (i) lawyers can give proper legal advice only if aware of the relevant facts, (ii) a legal department has to be able to prepare and retain internal notes reflecting legal research, (iii) clear advice is only possible if the lawyer can give it in writing. There is also a problem with the exchange of confidential information: as certain Member States recognise the privilege to in-house lawyers, the exchange of confidential information is likely to present difficulties and results in inconsistent application and enforcement.

8. Impact on national laws & systems

8.1. Principle of primacy of Community law

European Parliament and Economic & Social Committee

The resolution of the European Parliament emphasises that the proposed reforms should not lead to a renationalisation of competition policy and that the primacy of Community law must not be called into question.

The ECOSOC also stresses that the proposed reform must not lead to a renationalisation of EC competition law. It should be expressly stated that
national law may not be applied to cases where Community law applies. It should also be provided that a decision establishing an infringement based on national law cannot take precedence over a decision or judgement according to which the conditions of Article 81(3) are fulfilled.

**Member States**

Member States have not addressed the question of the impact of decentralisation on the primacy of Community law.

**Industry and lawyers**

A few respondents argue that the legal exception principle will remove the basis for the judgement in Walt Wilhelm, which is based on the constitutive character of Article 81(3) decisions. Under the proposed system an agreement is either compatible with Article 81 in its entirety or it is not. There is thus only room for declaratory decisions. It is therefore believed that application of the legal exception principle may therefore threaten the primacy of Community law.

8.2. **Need for harmonisation of procedural rules**

**European Parliament**

The ECOSOC considers that harmonisation of the national procedural rules would be desirable in order to promote consistent application of the substantive rules.

**Member States, EEA States and ESA**

Only one Member State has made a call for harmonisation of national procedural rules applied by national competition authorities or national courts. Two Member States are expressly opposed to harmonisation in either of those areas.

Some Member States point out that the proposed reform may lead them to reconsider national authorisation and notification systems.

One Member State states that the proper functioning of the network may require gradual harmonisation of procedural laws.

**Industry and lawyers**

Many respondents fear that decentralisation without harmonisation of national procedural rules would create a serious risk of incoherence to the detriment of the Internal Market. Procedural rules differ considerably from one Member State to the other. This is considered particularly problematic in the field of sanctions and fact finding powers.

Such differences may promote forum shopping. It is therefore proposed that decentralisation should be subject to harmonisation of procedural rules.

A number of respondents argue that procedural differences create particular problems for the exchange of confidential information amongst competition
authorities. It is therefore insisted that any such exchange must be subject to effective safeguards for the protection of the rights of defence.

8.3. Adaptation of the system to PECO countries

*European Parliament and Economic & Social Committee*

The European Parliament observes, with reference to the future enlargement of the European Union, that the applicant countries, all of which come from a system of planned economy, face special challenges in establishing an effective competition system and calls the Commission to assist these countries more by means of information and cooperation in order to ensure that the requisite institutions and the requisite staff are available in time.

*Member States, EEA States and ESA, PECO*

Two Member States have doubts as to the effective implementation of the legal exception rule in the applicant countries. The concern is that the applicant countries have only recently switched to a market economy, that there is no real competition culture and that the national courts in these countries are not accustomed to applying competition law.

*Industry and lawyers*

Some respondents fear that applicant countries will not be able to enforce the rules for lack of experience and that the authorities in these countries will be subject to strong political pressure. The concern is therefore that in practice there will be little enforcement in these countries.

Others argue that the applicant countries are in the same position as the old Member States at the time of the adoption of Regulation 17. The risk of incoherent application is considered particularly strong with regard to the applicant countries, leading either to the conclusion that decentralisation should not occur or that special assistance to these countries may be required initially.

8.4. Impact on EEA agreement and on European Agreements

In the opinion of EFTA States the reform should be extended to the EEA agreement in order to ensure coherence. This could be done by way of amending one of the protocols. National competition authorities should therefore also be empowered to apply Articles 53 and 54 of the EEA agreement. The high level of co-operation must be ensured in the new system.

ESA also supports the Commission’s reform proposal but considers that ESA and the Commission should retain exclusive competence in respect of cases that involve the EEA rules. Otherwise there is a risk that these rules will no longer be applied. The co-operation mechanism under the EEA Agreement should not be decentralised. The Commission might use Article 9(3) to withdraw cases with an EEA dimension from the national competition authorities.
One applicant country considers that the Commission should have exclusive competence in cases that involve third countries, in particular for cases involving the application of the European agreements.

9. **SPECIFIC RULES**

*Member States*

Only three Member States have expressed a view on the application of the proposed system to the agricultural and transport sectors. They are all in favour of the proposal.

*Industry*

Some contributions have been made by associations of undertakings active in the transport sector. While the transport operators seek, to varying degrees, to maintain the specific procedural rules that apply to transport sectors, transport users agree with the Commission’s proposal to remove those specific procedures. The arguments put forward are similar to the arguments developed above.