

Deutsche Vereinigung  
für gewerblichen Rechtsschutz  
und Urheberrecht e.V.

Deutsche Vereinigung für gewerblichen Rechtsschutz und Urheberrecht  
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(Bei der Antwort bitte angeben)

**White Paper on Modernisation of the Rules Implementing Articles 85 and 86  
of the EC Treaty; OJ C 132 of 12 May 1999**

Dear Sir,

In the Official Journal of 12th May 1999, the Commission presented a "White Paper on Modernisation of the Rules Implementing Articles 85 and 86 EC Treaty" (***the White Paper***), and requested interested groups and institutions to comment on the White Paper. The Deutsche Vereinigung für gewerblichen Rechtsschutz und Urheberrecht (German Association for Intellectual Property Rights and Copyrights - ***the Association***) is a professional organisation whose official purpose includes advising legislative bodies in questions relating to the protection of intellectual property rights. Its members include representatives from all professional groups interested in the protection of intellectual property rights; lawyers and patent lawyers, judges, professors, officials of specialist authorities as well as Ministries and corporate representatives. The Association thus has a traditional role in commenting on all important statutory matters relating to intellectual property rights. As the implementation of the proposals contained in the White Paper would result in significant changes to the procedure applying to cooperative agreements between undertakings, the Competition Law Committee of the Association, comprising those members specialised in competition law, discussed the White Paper in considerable detail in one of its meetings and, on the basis of a draft prepared by a working group of the Committee, compiled the following comments. These comments thus reflect the opinion of the lawyers and patent lawyers involved with intellectual property rights.

We proceed from the assumption that there will be sufficient opportunity to comment on individual questions in the course of the further legislative process. The present comments are thus restricted to basic remarks on the concept of the White Paper for revising the rules implementing the competition rules of the EC Treaty (*the Treaty*).

## **A. The Abolition of the Notification and Authorisation System; Change to a Directly Applicable Exception System**

The aim of the White Paper to relieve the Commission's workload by changing from a system of prohibition subject to express authorisation to a system of legal exception, is in principle to be welcomed. In our opinion, however, the associated decentralisation of the application of the competition provisions, as well as the unavoidable decrease in legal security, will only be acceptable to a large number of undertakings and their internal and external consultants if the future system guarantees the coherence of the development of Community law and as much legal certainty as possible. At the same time, the justified interests of the undertakings in avoiding the risk of fines are to be taken into account in legally ambiguous cases.

### **1. Compatibility of the Directly Applicable Exception System with Art. 81 EC Treaty**

In the German legal literature, renowned academics (including Prof. Mestmäcker, Prof. Möschel, Prof. Rittner) have adopted the viewpoint that a transition to the system of legal exception would require an amendment to the Treaty. The discussion whether Art. 81 of the Treaty is based on a principle of legal exception or statutory prohibition subject to authorisation is as old as the Treaty itself, just as, when the Regulation 17/62 was adopted, there was some disagreement as to whether the Treaty contains an authorisation to regulate this question within the scope of the implementing regulation. The doubts regarding whether the transition to a directly applicable exception system is sufficiently legitimised would become stronger if, as is obviously intended at present, the block exemption regulations were to remain in force, with the result that positive exemptions on the basis of the block exemption regulations would co-exist with the directly applicable legal exception. This would give rise to a mixed system of exemption and legal exception.

We consider the objections raised in the discussions so far to be so serious that we would like to suggest commissioning an independent legal opinion on the question of compatibility with the Treaty or (in so far as this is admissible under the Treaty) to ask the Court of Justice for its informal comments before implementing the White Paper.

## II. Coherence of the Developments in Community Law

In the system of decentralised application of the competition rules, it is of paramount importance to ensure the consistent and uniform application of the competition rules in the various Member States. Even if the competition rules are already directly applicable in the Member States under present law, the introduction of a system of purely decentralised application of competition rules in which the national courts and cartel authorities are in particular able to apply the exemption conditions of Art. 81 para. 3 EC Treaty, would increase the danger of the competition laws being applied differently in the various Member States and comparable facts being decided differently by the competent authorities of the various Member States.

1. The block exemption regulations thus are particularly important for the coherence of the application of Community law in a system of decentralised application. The White Paper does not clarify the relationship between the block exemption regulations and the directly applicable exception system. In a pure legal exception system, there is in principle no room for block exemption regulations having the effect of positive decisions. Irrespective of the future legal quality of the block exemption regulations, the binding effect of such regulations for national regulatory authorities and national courts must be clarified in the new implementing regulations.
2. In our opinion, the proceedings suggested in the White Paper for ensuring this coherence outside the block exemption regulations is not sufficient. In particular, the Commission's right to take over proceedings pending with the national authorities cannot be applied to proceedings pending before the national courts, due to the principle relating to the division of powers. However, in the new system of decentralised application the courts will have an overriding importance. The proceedings possible under Art. 234 EC Treaty (preliminary decision) or Art. 226 EC Treaty (proceedings relating to a contravention of Treaty provisions) are too ponderous and thus unsuitable to produce coherence. The future implementing regulation should thus contain provisions regulating how possible cases of conflict can be solved.

Divergent decisions of national cartel authorities can be avoided by a duty of consultation being created for those cartel authorities wishing to deviate from the decision of another cartel authority. As the future system does not provide for positive decisions on the part of the national cartel authority, there can only be deviating decisions if the first cartel authority has reached a negative decision while the second cartel authority involved with the same facts wishes to proceed from a compatibility with European cartel law. In this event, the implementing regulation must provide for the possibility of a positive decision on the part of the Commission.

This positive decision would at the same time provide the basis for overriding a negative decision made by the first cartel authority.

In order to avoid incongruous decisions by the national courts, the implementing regulation would also need to provide for the possibility of the Commission issuing a positive decision in cases being decided by the court. This cannot take the form of a duty to present the case to the Commission due to the division of powers principle. The national court wishing to deviate from the positive decision of another court could, however, suspend proceedings and request the party concerned to obtain a decision from the Commission. If the Commission reaches the conclusion, on the basis of the subsequent examination, that the agreement falls within the area of application of Art. 81 para. 1, but that the preconditions for an exemption under para. 4 are not fulfilled, it issues a negative decision. On the basis of this decision, the proceedings could be resumed before the national court, which proceeded from the validity of the agreement, thus once again creating uniformity. In order not to delay the proceedings before the national courts, it could be stipulated that after expiry of a particular period (e.g. 4 months) a positive decision is deemed not to have been issued. If the Commission comes to the conclusion that the preconditions of Art. 81 para. 3 EC Treaty are fulfilled, it issues a positive decision which binds the court due to the precedence of Community law.

3. Besides the uniformity of legal development and application, coherence of Community law also covers the uniformity of the law itself. Thus, decisions based on national cartel law cannot contradict positive decisions decided in accordance with European competition law. This principle is secured by the precedence of Community law. In its "Walt Wilhelm"<sup>1</sup> decision the European Court of Justice has stated that only positive decisions of the Commission under Art. 81 para. 3 EC Treaty take precedence over national competition law. According to general opinion also block exemption regulations have a positive effect within the meaning of the EC case law. In the directly applicable exception system, in future there would be no more positive decisions of the Commission and it remains unclear whether the block exemption regulations would develop such positive effect in future. Within the scope of a system of legal exception, it is thus indispensable to secure the principle of the precedence of Community law with a view to agreements automatically exempted under Art. 81 para. 3 EC Treaty. In so far, Art. 83 para. 2 lit. e) EC Treaty represents a sufficient authorisation basis.
4. The measures for ensuring coherence suggested here only lead to the Commission becoming active in the event of divergent decisions of national authorities. The associated personnel expenditure is restricted, as the Commission only takes on cases in the event of threatening diversity between decisions of the national cartel

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<sup>1</sup> case law 1969, 1 et seq.

authorities and courts. The principle aim of the White Paper to reduce the work of the Commission is thus not put into question.

### **III. Legal Certainty and Risk of Fines**

The effectiveness of the system of legal exception will not only be judged on coherence but also on whether a sufficient amount of legal certainty is retained. In contrast to the former system, there will be no possibility of applying for individual exemptions, so that the undertakings will bear an increased risk of invalidity and fines. The implementation of the White Paper must thus be accompanied by supplementary measures to improve legal certainty.

1. We thus fully approve of the plan of the White Paper to include the so-called partial-function joint ventures in the area of application of the Merger Control Regulation.
2. There are however other forms of cooperation between enterprises which also require considerable investments. These include e.g. large joint research projects which can be exempted under Art. 81 para. 3 EC Treaty but which do not fulfil the conditions of the block exemption regulations. The undertakings cannot be expected to invest in such types of co-operation on a legally uncertain basis. The block exemption regulations thus have considerable importance notwithstanding their legal evaluation in the future system. Now that a new block exemption regulation has already been prepared in the field of vertical restraints, the block exemption regulations relating to horizontal agreements also urgently need to be reviewed and amended with a view to their practicability and effectiveness.
3. The block exemption regulations alone would not be sufficient to create sufficient legal certainty for each individual case. The Commission would thus also need to remain available for informal discussions in future. Such informal discussions are also compatible with the system of legal exception and the decentralised application of European competition rules, as well as the aim of the White Paper to relieve the workload of the Commission. Even if no positive decision is issued on the basis of such informal discussions, written comments of the Commission on the compatibility of the agreements with the competition rules of the Treaty are such as to create legal certainty even if neither the national nor the European courts are bound by such comments. The system of legal exception also gives rise to the possibility of restricting such informal discussions to co-operation projects of significant economic or fundamental legal importance.
4. In order to avoid incalculable risks of fines arising from the impossibility of making prior applications, guidelines to the interpretation of the new implementing regulation should exclude the risk of fines in legally uncertain cases. This corresponds to the present practice of the Commission to conclude proceedings

relating to legal questions of fundamental importance, which have not formerly been decided by the Commission nor the ECJ, without imposing fines.

## **B. Strengthening the Subsequent Control**

In our opinion, the improvements in the investigation competence required by the Commission are only then acceptable if, at the same time, the undertakings' rights of defence are improved and secured in the implementing regulation.

1. For this reason, there is an urgent need to regulate the rights of the respective undertaking to an unrestricted access to the files. The present right to inspect files, under which the Commission is able to decide which documents it wishes to make available and which deprives the undertakings of the possibility of searching for redeeming material, is incompatible with the principle of equal weaponry (*Waffengleichheit*).
2. If the White Paper favours a centralisation of the judicial authorisation to enforce investigation decisions, in order to observe the constitutional principle of inviolability of home and business rooms, it is to be ensured that the court of the Community entrusted with judicial control not only examines the formally valid issuing of such a decision by the Commission, but also whether there are sufficient indications of a violation of the competition rules. This is the only procedure compatible with the constitutional principle of Art. 13 of the German Constitution.
3. There are serious legal problems with extending competences to directly question the employees at the undertaking's premises, insofar as the Commission's right extends beyond the present rule in Art. 14 VO 17/62 to cover the asking of questions which do not directly relate to the documents found in the business. Such far-reaching right of questioning would give rise to uncontrolled investigation rights and place the employee concerned in a conflict of loyalty with its employer. In addition, the rights of in-house and external legal counsels are to be secured, taking into account the confidentiality to which they are subject under national law, in order to guarantee an effective system of legal advice serving the avoidance of contraventions against the competition rules.

We are extremely interested in the further course of the discussion and would be grateful if you would involve us in the further proceedings for the implementation of the White Paper.

Dr. Gloy  
Präsident

Dr. Loschelder  
Generalsekretär

