

Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 ('Regulation implementing Articles 81 and 82 of the Treaty')

(2000/C 365 E/28)

(Text with EEA relevance)

COM(2000) 582 final — 2000/0243(CNS)

(Submitted by the Commission on 28 September 2000)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 83 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas:

- (1) If a system is to be established which ensures that competition in the common market is not distorted, Articles 81 and 82 must be applied effectively and uniformly in the Community. Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty⁽¹⁾, has allowed a Community competition policy to develop that has helped to disseminate a competition culture within the Community. In the light of experience, however, that Regulation should now be replaced by legislation designed to meet the challenges of an integrated market and a future enlargement of the Community.
- (2) In particular, there is a need to rethink the arrangements for applying the exception from the prohibition on agreements, which restrict competition, laid down in Article 81(3). Under Article 83(2)(b), account must be taken in this regard of the need to ensure effective supervision, on the one hand, and to simplify administration to the greatest possible extent, on the other.
- (3) The centralised scheme set up by Regulation No 17 no longer secures a balance between those two objectives. It hampers application of the Community competition rules

by the courts and competition authorities of the Member States, and the system of notification it involves prevents the Commission from concentrating its resources on curbing the most serious infringements. It also imposes considerable costs on undertakings.

- (4) The present system should therefore be replaced by a directly applicable exception system in which the competition authorities and courts of the Member States have the power to apply not only Articles 81(1) and 82, which have direct applicability by virtue of the case-law of the Court of Justice of the European Communities, but also Article 81(3).
- (5) It should be specified here that, in line with the case-law developed in the framework of Regulation No 17, the burden of proving that the conditions of Article 81(3) are fulfilled rests on the party seeking to rely on that provision. That party is usually best placed to prove that the conditions of that paragraph are fulfilled.
- (6) In order to ensure that the Community competition rules are applied effectively, the competition authorities of the Member States must be associated more closely with their application. To this end, they must be empowered to apply Community law.
- (7) National courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements. The role of the national courts here complements that of the competition authorities of the Member States. They must therefore be allowed to apply Articles 81 and 82 of the Treaty in full.
- (8) In order to ensure that the same competition rules apply to businesses throughout the Community, provision must be made pursuant to Article 83(2)(e) to regulate the relationship between Articles 81 and 82 and national competition law by excluding the application of national law to agreements, decisions and practices within the scope of Articles 81 and 82.

⁽¹⁾ OJ 13, 21.2.1962, p. 204/62; Regulation as last amended by Regulation (EC) No 1216/1999 (OJ L 148, 15.6.1999, p. 5).

- (9) Although, in the new system, application of the rules will be decentralised, the uniformity of Community law requires that the rules be laid down centrally. To this end, the Commission must be given a general power to adopt block exemption regulations in order to enable it to adapt and clarify the legislative framework. This power must be exercised in close cooperation with the competition authorities of the Member States. It must be without prejudice to the existing rules in Council Regulations (EEC) No 1017/68 ⁽¹⁾, (EEC) No 4056/86 ⁽²⁾ and (EEC) No 3975/87 ⁽³⁾.
- (10) As the system of notification will now come to an end, it may be expedient, in order to improve transparency, to require registration of certain types of agreement. The Commission should accordingly be empowered to require registration of certain types of agreement. If any such requirement is introduced, it must not confer any entitlement to a decision on the compatibility with the Treaty of the agreement registered, and must not be prejudicial to effective action against infringements.
- (11) For it to ensure that the provisions of the Treaty are applied, the Commission must be able to address decisions to undertakings or associations of undertakings for the purpose of bringing to an end infringements of Articles 81 and 82. Provided there is a legitimate interest in doing so, the Commission must also be able to adopt decisions which find that an infringement has been committed in the past even if it does not impose a fine. This Regulation should also make explicit provision for the Commission's power to adopt decisions ordering interim measures, which has been acknowledged by the Court of Justice.
- (12) Where, in the course of proceedings which might lead to an agreement being prohibited, undertakings offer the Commission commitments such as to meet its objections, the Commission should be able to adopt decisions which make those commitments binding on the undertakings concerned, without settling the question of the applicability of Article 81 or Article 82, so that the commitments can be relied upon by third parties before national courts and failure to comply with them can be punished by the imposition of fines and periodic penalty payments.
- (13) In exceptional cases where the public interest of the Community so requires, it may also be expedient for the Commission to adopt a decision of a declaratory nature finding that the prohibition in Article 81 or Article 82 does not apply, with a view to clarifying the law and ensuring its consistent application throughout the Community.
- (14) If the Commission and the competition authorities of the Member States are to form together a network of public authorities applying the Community competition rules in close cooperation, arrangements for information and consultation must be set up and the exchange of information must be allowed between the members of the network even where the information is confidential, subject to appropriate guarantees for undertakings.
- (15) If the competition rules are to be applied consistently and, at the same time, the network is to be managed in the best possible way, it is essential to retain the rule that the competition authorities of the Member States are automatically relieved of their competence if the Commission initiates its own proceedings.
- (16) To ensure that cases are dealt with by the most appropriate authorities within the network, a general provision should be laid down allowing a competition authority to suspend or close a case on the ground that another authority is dealing with it or has already dealt with it, the objective being that each case should be handled by a single authority. This provision must not prevent the Commission from rejecting a complaint for lack of Community interest, as the case-law of the Court of Justice has acknowledged it may do, even if no other competition authority has indicated its intention of dealing with the case.
- (17) The Advisory Committee on Restrictive Practices and Dominant Positions set up by Regulation No 17 has functioned in a very satisfactory manner. It will fit perfectly into the new system of decentralised application. It is necessary, therefore, to build upon the rules laid down by Regulation No 17, while improving the effectiveness of the organisational arrangements. To this end, it would be expedient to allow opinions to be delivered by written procedure. The Advisory Committee should also be able to act as a forum for discussing cases handled by the competition authorities of the Member States, so as to help safeguard the consistent application of the Community competition rules.

⁽¹⁾ OJ L 175, 23.7.1968, p. 1; Regulation as last amended by the Act of Accession of Austria, Finland and Sweden.

⁽²⁾ OJ L 378, 31.12.1986, p. 4; Regulation as amended by the Act of Accession of Austria, Finland and Sweden.

⁽³⁾ OJ L 374, 31.12.1987, p. 1; Regulation as last amended by Regulation (EC) No 2410/92 (OJ L 240, 24.8.1992, p. 18).

- (18) Consistency in the application of the competition rules also requires that arrangements be established for cooperation between the courts of the Member States and the Commission. In particular, it will be useful to allow national courts to ask the Commission for information or for its opinion on points concerning the application of Community competition law. The Commission and the competition authorities of the Member States must also be able to submit written or oral observations to courts called upon to apply Article 81 or Article 82. Steps must therefore be taken to ensure that the Commission and the competition authorities of the Member States are kept sufficiently well informed of proceedings before national courts.
- (19) In order to ensure compliance with the principles of legal certainty and the uniform application of the Community competition rules in a system of parallel powers, conflicting decisions must be avoided. When the Commission has adopted a decision, therefore, the competition authorities and courts of the Member States must use every effort to avoid contradicting it. In this context, it should be recalled that the courts may refer questions to the Court of Justice for a preliminary ruling.
- (20) The Commission must be empowered throughout the Community to require such information to be supplied and to undertake such inspections as are necessary to detect any agreement, decision or concerted practice prohibited by Article 81 or any abuse of a dominant position prohibited by Article 82. The competition authorities of the Member States must cooperate actively in the exercise of these powers.
- (21) The detection of infringements of the competition rules is growing ever more difficult, and, in order to protect competition effectively, the Commission's powers of investigation need to be supplemented. The Commission must in particular be empowered to interview any persons who may be in possession of useful information and to record the statements made. In the course of an inspection, authorised Commission officials must be empowered to affix seals and to ask for any information relevant to the subject matter and purpose of the inspection.
- (22) It is expedient to clarify, in keeping with the case-law of the Court of Justice, the limits to the power of review that the national courts may exercise when asked, under national law, to order measures allowing assistance from law enforcement authorities in order to overcome opposition on the part of an undertaking to an inspection ordered by decision.
- (23) Experience has shown that business records are often kept in the homes of directors or other people working for an undertaking. In order to safeguard the effectiveness of inspections, therefore, authorised Commission officials should be empowered to enter any premises where business records may be kept, including private homes. However, the exercise of this latter power must be subject to the authorisation of the judicial authority.
- (24) In order to help the competition authorities of the Member States to apply Articles 81 and 82 effectively, it is expedient to enable them to assist one another by carrying out fact-finding measures.
- (25) Compliance with Articles 81 and 82 and the fulfilment of the obligations imposed on undertakings and associations of undertakings under this Regulation must be enforceable by means of fines and periodic penalty payments. To that end, appropriate levels of fine should also be laid down for infringements of the procedural rules.
- (26) The rules on periods of limitation for the imposition of fines and periodic penalty payments were laid down in Council Regulation (EEC) No 2988/74⁽¹⁾, which also concerns penalties in the field of transport. In a system of parallel powers, the acts, which may interrupt a limitation period, should include procedural steps taken independently by the competition authority of a Member State. To clarify the legal framework, Regulation (EEC) No 2988/74 should therefore be amended to prevent it applying to matters covered by this Regulation, and this Regulation should include provisions on periods of limitation.
- (27) The undertakings concerned must be accorded the right to be heard by the Commission, third parties whose interests may be affected by a decision must be given the opportunity of submitting their observations beforehand, and the decisions taken must be widely publicised. While ensuring the rights of defence of the undertakings concerned, in particular, the right of access to the file, it is essential that business secrets be protected. The confidentiality of information exchanged in the network must likewise be safeguarded.
- (28) Since all decisions taken by the Commission under this Regulation are subject to review by the Court of Justice in accordance with the Treaty, the Court of Justice should, in accordance with Article 229 thereof be given unlimited jurisdiction in respect of decisions by which the Commission imposes fines or periodic penalty payments.

⁽¹⁾ OJ L 319, 29.11.1974, p. 1.

- (29) The principles laid down in Articles 81 and 82 of the Treaty, as they have been applied by Regulation No 17, have given a central role to the Community bodies.

This central role should be retained, whilst associating the Member States more closely with the application of the Community competition rules. In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, this Regulation confines itself to the minimum required in order to achieve its objective, which is to allow the Community competition rules to be applied effectively, and does not go beyond what is necessary for that purpose.

- (30) As the case-law has made it clear that the competition rules apply to transport, that sector should be made subject to the procedural provisions of this Regulation. Regulations (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87 should therefore be amended in order to delete the specific procedural provisions they contain.

- (31) In order to take account of the new arrangements established by this Regulation, the following Regulations should be repealed: Council Regulation No 141 of 26 November 1962 exempting transport from the application of Regulation No 17⁽¹⁾, Council Regulation No 19/65/EEC of 2 March 1965 on application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices⁽²⁾, Council Regulation (EEC) No 2821/71 of 20 December 1971 on application of Article 85(3) of the Treaty to categories of agreements, decisions and concerted practices⁽³⁾, Council Regulation (EEC) No 3976/87 of 14 December 1987 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector⁽⁴⁾, Council Regulation (EEC) No 1534/91 of 31 May 1991 on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector⁽⁵⁾, and Council Regulation (EEC) No 479/92 of 25 February 1992 on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia)⁽⁶⁾,

⁽¹⁾ OJ 124, 28.11.1962, p. 2751/62; Regulation as last amended by Regulation No 1002/67/EEC (OJ 306, 16.12.1967, p. 1).

⁽²⁾ OJ 36, 6.3.1965, p. 533/65; Regulation as last amended by Regulation (EC) No 1215/1999 (OJ L 148, 15.6.1999, p. 1).

⁽³⁾ OJ L 285, 29.12.1971, p. 46; Regulation as last amended by the Act of Accession of Austria, Finland and Sweden.

⁽⁴⁾ OJ L 374, 31.12.1987, p. 9; Regulation as last amended by the Act of Accession of Austria, Finland and Sweden.

⁽⁵⁾ OJ L 143, 7.6.1991, p. 1.

⁽⁶⁾ OJ L 55, 29.2.1992, p. 3; Regulation as amended by the Act of Accession of Austria, Finland and Sweden.

HAS ADOPTED THIS REGULATION:

CHAPTER I

PRINCIPLES

Article 1

Direct applicability

Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which do not satisfy the conditions of Article 81(3), and the abuse of a dominant position referred to in Article 82, shall be prohibited, no prior decision to that effect being required.

Article 2

Burden of proof

In any national or Community proceedings for the application of Article 81 and Article 82 of the Treaty, the burden of proving an infringement of Article 81(1) or of Article 82 shall rest on the party alleging the infringement. A party claiming the benefit of Article 81(3) shall bear the burden of proving that the conditions of that paragraph are fulfilled.

Article 3

Relationship between Articles 81 and 82 and national competition laws

Where an agreement, a decision by an association of undertakings or a concerted practice within the meaning of Article 81 of the Treaty or the abuse of a dominant position within the meaning of Article 82 may affect trade between Member States, Community competition law shall apply to the exclusion of national competition laws.

CHAPTER II

POWERS

Article 4

Powers of the Commission

1. For the purpose of applying Articles 81 and 82 of the Treaty, the Commission shall have the powers provided for by this Regulation.

2. The Commission may, by regulation, determine types of agreements, decisions of associations of undertakings and concerted practices caught by Article 81(1) of the Treaty which must be registered by undertakings. In that event, it shall also determine the procedures for such registration and the penalties applicable in the event of failure to comply with the obligation. Registration of an agreement, a decision of an association or a concerted practice shall confer no entitlement

on the registering undertakings or associations of undertakings and shall not form an obstacle to the application of this Regulation.

Article 5

Powers of the competition authorities of the Member States

The competition authorities of the Member States shall have the power in individual cases to apply the prohibition in Article 81(1) of the Treaty where the conditions of Article 81(3) are not fulfilled, and the prohibition in Article 82. For this purpose, acting on their own initiative or on a complaint, they may take any decision requiring that an infringement be brought to an end, adopting interim measures, accepting commitments or imposing fines, periodic penalty payments or any other penalty provided for in their national law. Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part.

Article 6

Powers of the national courts

National courts before which the prohibition in Article 81(1) of the Treaty is invoked shall also have jurisdiction to apply Article 81(3).

CHAPTER III

COMMISSION DECISIONS

Article 7

Finding and termination of infringement

1. Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 81 or of Article 82 of the Treaty, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any obligations necessary, including remedies of a structural nature. If it has a legitimate interest in doing so, it may also find that an infringement has been committed in the past.

2. Those entitled to lodge a complaint for the purposes of paragraph 1 are Member States and natural or legal persons who can show a legitimate interest.

Article 8

Interim measures

1. In cases of urgency due to the risk of serious and irreparable damage to competition, the Commission, acting on its own initiative, may, on the basis of a *prima facie* finding of infringement, by decision order interim measures.

2. A decision under paragraph 1 shall apply for a maximum of one year but shall be renewable.

Article 9

Commitments

1. Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments such as to meet the Commission's objections, the Commission may by decision make those commitments binding on the undertakings. Such a decision shall be adopted for a specified period.

2. Irrespective of whether or not there has been or still is an infringement of Article 81 or Article 82 of the Treaty, such a decision shall terminate the proceedings.

3. The Commission may reopen the proceedings:

- (a) where there has been a material change in any of the facts on which the decision was based;
- (b) where the undertakings concerned act contrary to their commitments; or
- (c) where the decision was based on incomplete, incorrect or misleading information.

Article 10

Finding of inapplicability

For reasons of the Community public interest, the Commission, acting on its own initiative, may by decision find that, on the basis of the information in its possession, Article 81 of the Treaty is not applicable to an agreement, a decision of an association of undertakings or a concerted practice, either because the conditions of Article 81(1) are not fulfilled, or because the conditions of Article 81(3) are satisfied.

The Commission may likewise make such a finding with reference to Article 82 of the Treaty.

CHAPTER IV

COOPERATION WITH NATIONAL AUTHORITIES AND COURTS

Article 11

Cooperation between the Commission and the competition authorities of the Member States

1. The Commission and the competition authorities of the Member States shall apply the Community competition rules in close cooperation.

2. The Commission shall forthwith transmit to the competition authorities of the Member States copies of the most important documents it has collected with a view to applying Articles 7 to 10.

3. Where a matter involving the application of Article 81 or Article 82 of the Treaty is referred to the competition authorities of the Member States or where they act on their own initiative to apply those Articles, they shall inform the Commission accordingly at the outset of their own proceedings.

4. Where competition authorities of Member States intend to adopt a decision under Article 81 or Article 82 of the Treaty requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption regulation, they shall first consult the Commission. For that purpose, they shall no later than one month before adopting the decision provide the Commission with a summary of the case and with copies of the most important documents drawn up in the course of their own proceedings. At the Commission's request, they shall provide it with a copy of any other document relating to the case.

5. The competition authorities of the Member States may consult the Commission on any other case involving the application of Community law.

6. The initiation by the Commission of proceedings for the adoption of a decision under this Regulation shall relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82 of the Treaty.

Article 12

Exchange of information

1. Notwithstanding any national provision to the contrary, the Commission and the competition authorities of the Member States may provide one another with and use in evidence any matter of fact or of law, including confidential information.

2. Information provided under paragraph 1 may be used only for the purpose of applying Community competition law. Only financial penalties may be imposed on the basis of information provided.

Article 13

Suspension or termination of proceedings

1. Where competition authorities of two or more Member States have received a complaint or are acting on their own initiative under Article 81 or Article 82 of the Treaty against the same agreement, decision of an association or practice, the fact that one authority is dealing with the case shall be sufficient grounds for the others to suspend the proceedings before them or to reject the complaint. The Commission may

likewise reject a complaint on the ground that the competition authority of a Member State is dealing with the case.

2. Where the competition authority of a Member State or the Commission has received a complaint against an agreement, decision of an association or practice which has already been dealt with by another competition authority, it may reject it.

Article 14

Advisory Committee

1. An Advisory Committee on Restrictive Practices and Dominant Positions shall be consulted prior to the taking of any decision under Articles 7, 9, 10, 22 and 23(2).

2. The Advisory Committee shall be composed of representatives of the competition authorities of the Member States. Each Member State shall appoint a representative who, if prevented from attending, may be replaced by another representative.

3. The consultation may take place at a meeting convened by the Commission, which shall supply the chairman, not earlier than fourteen days after dispatch of the notice convening it. The Member States may accept a period of notice of less than fourteen days. The Commission shall attach to the notice convening the meeting a summary of the case, together with an indication of the most important documents, and a preliminary draft decision. The Advisory Committee shall deliver an opinion on the Commission's preliminary draft decision. It may deliver an opinion even if some members are absent and are not represented.

4. Consultation may also take place by written procedure. In that case, the Commission shall determine a date by which the Member States are to put forward their observations. However, if any Member State so requests, the Commission shall convene a meeting.

5. The opinion of the Advisory Committee shall be delivered in writing and appended to the draft decision. The Advisory Committee may recommend publication of the opinion. The Commission may carry out such publication. The decision to publish shall take account of the legitimate interest of undertakings in the protection of their business secrets.

6. Acting on its own initiative or at the request of a Member State, the Commission may include a case being dealt with by the competition authority of a Member State on the agenda of the Advisory Committee for discussion before the final decision is adopted.

Article 15

Cooperation with national courts

1. In proceedings for the application of Article 81 or Article 82 of the Treaty, courts of the Member States may ask the Commission for information in its possession or for its opinion on questions concerning the application of the Community competition rules.

2. Courts of the Member States shall send the Commission copies of any judgments applying Article 81 or Article 82 of the Treaty within one month of the date on which the judgment is delivered.

3. For reasons of the Community public interest, the Commission may, on its own initiative, submit written or oral observations to courts of the Member States on the subject of proceedings in which questions concerning the application of Article 81 or Article 82 of the Treaty arise. It may have itself represented by competition authorities of Member States. Acting on their own initiative, competition authorities of Member States may likewise submit written or oral observations to the national courts of their Member State.

To this end, the Commission and the competition authorities of the Member States may request the national courts to transmit to them any documents necessary.

Article 16

Uniform application of Community competition law

In accordance with Article 10 of the Treaty and the principle of the uniform application of Community law, national courts and the competition authorities of the Member States shall use every effort to avoid any decision that conflicts with decisions adopted by the Commission.

CHAPTER V

POWERS OF INVESTIGATION

Article 17

Inquiries into sectors of the economy

1. If, in any sector of the economy, the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition is being restricted or distorted within the common market, the Commission may conduct a general inquiry into that sector and, in the course of that inquiry, may request undertakings in the sector concerned to supply the information necessary for giving effect to Articles 81 and 82 of the Treaty and may carry out any inspections necessary for that purpose.

The Commission may in particular request any undertaking or association of undertakings in the sector concerned to communicate to it all agreements, decisions and concerted practices.

2. Articles 18 to 23 shall apply by analogy.

Article 18

Requests for information

1. In order to carry out the duties assigned to it by this Regulation, the Commission may request all necessary information from the governments and competition authorities

of the Member States and from undertakings and associations of undertakings.

2. In its request for information the Commission shall state the legal bases of the request, the time-limit within which the information is to be provided, the purpose of the request, and the penalties provided for in Articles 22 and 23 for supplying incorrect, incomplete or misleading information.

3. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or associations having no legal personality, the persons authorised to represent them by law or by their constitution shall supply the information requested. Lawyers duly authorised to act may supply the information on behalf of their clients. The latter shall remain fully responsible if the information supplied is incomplete, incorrect or misleading.

4. Where an undertaking or association of undertakings does not supply the information requested within the time-limit fixed or supplies incomplete information, the Commission shall by decision require the information to be supplied. The decision shall specify what information is required and fix an appropriate time-limit within which it is to be supplied. It shall indicate the penalties provided for in Article 22(1)(a), and indicate or impose the penalties provided for in Article 23(1)(d). It shall also indicate the right to have the decision reviewed by the Court of Justice of the European Communities.

Article 19

Power to take statements

In order to carry out the duties assigned to it by this Regulation, the Commission may interview any natural or legal person that may be in possession of useful information, in order to ask questions relating to the subject matter of an investigation and recording the answers.

Article 20

The Commission's powers of inspection

1. In order to carry out the duties assigned to it by this Regulation, the Commission may conduct all necessary inspections of undertakings and associations of undertakings.

2. The officials authorised by the Commission to conduct an inspection are empowered:

(a) to enter any premises, land and means of transport of the undertakings and associations of undertakings concerned;

- (b) to enter any other premises, including the homes of directors, managers and other members of staff of the undertakings and associations of undertakings concerned, in so far as it may be suspected that business records are being kept there;
- (c) to examine the books and other business records, irrespective of the medium on which they are stored;
- (d) to take copies of or extracts from the documents examined;
- (e) to seal any premises or business records during the inspection;
- (f) to ask any representative or member of staff of the undertaking or association of undertakings for information relating to the subject matter and purpose of the inspection and to record the answers.

3. The officials authorised by the Commission to conduct an inspection shall exercise their powers upon production of a written authorisation specifying the subject matter and purpose of the inspection and the penalties provided for in Article 22 in cases where production of the required books or other business records is incomplete or where the answers to questions asked under paragraph 2 of this Article are incorrect, incomplete or misleading. In good time before the inspection, the Commission shall give notice of the inspection to the competition authority of the Member State in whose territory it is to be conducted.

4. Undertakings and associations of undertakings are required to submit to inspections ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the penalties provided for in Articles 22 and 23 and the right to have the decision reviewed by the Court of Justice. The Commission shall take such decisions after consulting the competition authority of the Member State in whose territory the inspection is to be conducted.

5. Officials of the competition authority of the Member State in whose territory the inspection is to be conducted shall, at the request of that authority or of the Commission, actively assist the officials of the Commission. To this end, they shall enjoy the powers specified in paragraph 2.

6. Where the officials authorised by the Commission find that an undertaking opposes an inspection ordered pursuant to this Article, the Member State concerned shall afford them the necessary assistance, requesting where appropriate the assistance of the police, so as to enable them to conduct their inspection.

If national law requires authorisation from the judicial authority before the assistance of the police can be called upon, such authorisation may be applied for as a precautionary measure.

7. Where the officials authorised by the Commission wish to exercise the power provided for by paragraph 2(b), authorisation from the judicial authority must be obtained beforehand.

8. The lawfulness of the Commission decision shall be subject to review only by the Court of Justice. The power of review of the national court shall extend only to establishing that the Commission decision is authentic and that the enforcement measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. The national court may not review the necessity for the inspection or require information other than that set out in the Commission decision.

Article 21

Investigations by competition authorities of Member States

1. The competition authority of a Member State may in its own territory carry out any fact-finding measure under its national law on behalf and for the account of the competition authority of another Member State in order to establish whether there has been an infringement of Article 81 or Article 82 of the Treaty. It shall transmit the information collected to the requesting authority in accordance with Article 12 of this Regulation.

2. At the request of the Commission, the competition authorities of the Member States shall undertake the inspections which the Commission considers to be necessary under Article 20(1) or which it has ordered by decision pursuant to Article 20(4). The officials of the competition authorities of the Member States who are responsible for conducting these inspections shall exercise their powers upon production of a written authorisation issued by the competition authority of the Member State in whose territory the inspection is to be conducted. Such authorisation shall specify the subject matter and purpose of the inspection.

If so requested by the Commission or by the competition authority of the Member State in whose territory the inspection is to be conducted, the officials of the Commission may assist the officials of the authority concerned.

CHAPTER VI

PENALTIES

Article 22

Fines

1. The Commission may by decision impose on undertakings and associations of undertakings fines not exceeding 1 % of the total turnover in the preceding business year where, intentionally or negligently:

- (a) they supply incorrect, incomplete or misleading information in response to a request made pursuant to Article 17 or Article 18(1) or (4), or do not supply information within the time-limit fixed by a decision adopted pursuant to Article 18(4);
- (b) they produce the required books or other business records in incomplete form during inspections under Article 20 or Article 21(2), or refuse to submit to inspections ordered by a decision adopted pursuant to Article 20(4);
- (c) they refuse to answer a question asked in accordance with Article 20(2)(f) or give an incorrect, incomplete or misleading answer;
- (d) seals affixed by authorised officials of the Commission in accordance with Article 20(2)(e) have been broken.

2. The Commission may by decision impose on undertakings and associations of undertakings fines not exceeding 10 % of the total turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently:

- (a) they infringe Article 81 or Article 82 of the Treaty; or
- (b) they contravene a decision ordering interim measures under Article 8 of this Regulation; or
- (c) they fail to comply with a commitment made binding by a decision pursuant to Article 9 of this Regulation.

3. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

4. Where a fine is imposed on an association of undertakings under this Regulation and the association is not solvent, the Commission may require payment of the fine by any of the undertakings which were members of the association at the time the infringement was committed. The amount required to be paid by each individual member cannot exceed 10 % of its total turnover in the preceding business year.

5. Decisions taken pursuant to paragraphs 1 and 2 shall not be of a criminal law nature.

Article 23

Periodic penalty payments

1. The Commission may, by decision, impose on undertakings or associations of undertakings periodic penalty payments not exceeding 5 % of the average daily turnover in

the preceding business year per day and calculated from the date appointed by the decision, in order to compel them:

- (a) to put an end to an infringement of Article 81 or Article 82 of the Treaty, in accordance with a decision taken pursuant to Article 7 of this Regulation;
- (b) to comply with a decision ordering interim measures taken pursuant to Article 8;
- (c) to comply with a commitment made binding by a decision pursuant to Article 9;
- (d) to supply complete and correct information which it has requested by decision taken pursuant to Article 18(4);
- (e) to submit to an inspection which it has ordered by decision taken pursuant to Article 20.

2. Where the undertakings or associations of undertakings have satisfied the obligation which the periodic penalty payment was intended to enforce, the Commission may fix the definitive amount of the periodic penalty payment at a figure lower than that which would arise under the original decision. Article 22(4) shall apply by analogy.

CHAPTER VII

LIMITATION PERIODS

Article 24

Limitation periods for the imposition of penalties

1. The powers conferred on the Commission by Articles 22 and 23 shall be subject to the following limitation periods:

- (a) three years in the case of infringements of provisions concerning requests for information or the conduct of inspections;
- (b) five years in the case of all other infringements.

2. Time shall begin to run on the day on which the infringement is committed. However, in the case of continuing or repeated infringements, time shall begin to run on the day on which the infringement ceases.

3. Any action taken by the Commission or by the competition authority of a Member State for the purpose of the investigation or proceedings in respect of an infringement shall interrupt the limitation period for the imposition of fines or periodic penalty payments. The limitation period shall be interrupted with effect from the date on which the action is notified to at least one undertaking or association of undertakings which has participated in the infringement. Actions which interrupt the running of the period shall include in particular the following:

- (a) written requests for information by the Commission or by the competition authority of a Member State;

- (b) written authorisations to conduct inspections issued to its officials by the Commission or by the competition authority of a Member State;
- (c) the initiation of proceedings by the Commission or by the competition authority of a Member State;
- (d) notification of the statement of objections of the Commission or of the competition authority of a Member State.

4. The interruption of the limitation period shall apply for all the undertakings or associations of undertakings which have participated in the infringement.

5. Each interruption shall start time running afresh. However, the limitation period shall expire at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a periodic penalty payment. That period shall be extended by the time during which limitation is suspended pursuant to paragraph 6.

6. The limitation period for the imposition of fines or periodic penalty payments shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice.

Article 25

Limitation period for the enforcement of penalties

1. The power of the Commission to enforce decisions taken pursuant to Articles 22 and 23 shall be subject to a limitation period of five years.
2. Time shall begin to run on the day on which the decision becomes final.
3. The limitation period for the enforcement of penalties shall be interrupted:
 - (a) by notification of a decision varying the original amount of the fine or periodic penalty payment or refusing an application for variation;
 - (b) by any action of the Commission or of a Member State, acting at the request of the Commission, designed to enforce payment of the fine or periodic penalty payment.

4. Each interruption shall start time running afresh.

5. The limitation period for the enforcement of penalties shall be suspended for so long as:

- (a) time to pay is allowed;

- (b) enforcement of payment is suspended pursuant to a decision of the Court of Justice.

CHAPTER VIII

HEARINGS AND PROFESSIONAL SECRECY

Article 26

Hearing of the parties, complainants and others

1. Before taking decisions as provided for in Articles 7, 8, 22 and 23(2), the Commission shall give the undertakings or associations of undertakings which are the subject of the proceedings the opportunity of being heard on the matters to which the Commission has taken objection. The Commission shall base its decisions only on objections on which the parties concerned have been able to comment. Complainants shall be associated closely with the proceedings.

2. The rights of defence of the parties concerned shall be fully respected in the proceedings. They shall be entitled to have access to the file, subject to the legitimate interest of undertakings in the protection of their business secrets. That legitimate interest may not constitute an obstacle to the disclosure and use by the Commission of information necessary to prove an infringement.

The right of access to the file shall not extend to confidential information and internal documents of the Commission or the competition authorities of the Member States. In particular, any correspondence between the Commission and the Competition Authority of the Member States, or between the latter, *inter alia*, documents drawn up pursuant to Articles 8 and 11 are excluded.

3. If the Commission or the competition authorities of the Member States consider it necessary, they may also hear other natural or legal persons. Applications to be heard on the part of such persons shall, where they show sufficient interest, be granted.

Article 27

Professional secrecy

1. Without prejudice to Articles 12 and 15, information collected pursuant to Articles 17 to 21 shall be used only for the purpose for which it was acquired.

2. Without prejudice to Articles 11, 12, 14, 15 and 26, the Commission and the competition authorities of the Member States, their officials and other servants shall not disclose information acquired or exchanged by them pursuant to this Regulation and of the kind covered by the obligation of professional secrecy.

CHAPTER IX

BLOCK EXEMPTIONS*Article 28***Adoption of block exemption regulations**

1. In accordance with Article 81(3) of the Treaty, the Commission may, by regulation, declare that Article 81(1) is not applicable to categories of agreements, decisions by associations of undertakings or concerted practices, subject to the conditions in paragraphs 2 to 5 of this Article.

2. Exemption regulations must define the categories of agreements, decisions or concerted practices to which they apply and specify in particular the restrictions, which are not exempted, and any conditions that must be fulfilled.

3. Exemption regulations must be limited in time.

4. Before adopting an exemption regulation, the Commission must publish a draft thereof and invite all interested parties concerned to submit their comments within the time-limit it lays down, which may not be less than one month.

5. Before publishing a draft exemption regulation and before adopting such a regulation, the Commission shall consult the Advisory Committee on Restrictive Practices and Dominant Positions.

*Article 29***Withdrawal in individual cases**

1. Where, in any particular case, the Commission, acting on its own initiative or on a complaint, finds that agreements, decisions or concerted practices to which a block exemption regulation applies nevertheless have certain effects which are incompatible with Article 81(3) of the Treaty, it may withdraw the benefit of the regulation.

2. Where in any particular case agreements, decisions or concerted practices to which a block exemption regulation applies have effects which are incompatible with Article 81(3) of the Treaty in the territory of a Member State, or in a part thereof, which has all the characteristics of a distinct geographic market, the competition authority of that Member State may withdraw the benefit of the regulation in question in respect of that territory.

*Article 30***Regulations ending the application of a block exemption**

A block exemption regulation adopted pursuant to Article 28 may specify the circumstances which may lead to the exclusion

from its scope of certain types of agreement, decision or concerted practice that are applied on a particular market. Where those circumstances obtain, the Commission may establish this by way of regulation, and fix a period on the expiry of which the block exemption regulation will no longer be applicable to the relevant agreements, decisions or concerted practices on that market. That period must not be less than six months. Article 28(4) and (5) shall apply by analogy.

CHAPTER X

GENERAL PROVISIONS*Article 31***Publication of decisions**

1. The Commission shall publish the decisions, which it takes pursuant to Articles 7 to 10, 22 and 23.

2. The publication shall state the names of the parties and the main content of the decision, including any penalties imposed. It shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

*Article 32***Review by the Court of Justice**

The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.

*Article 33***Exclusions**

This Regulation shall not apply to agreements, decisions and concerted practices or to the abuse of a dominant position within the meaning of Article 82 of the Treaty in the following areas:

- (a) international sea transport of the tramp service type;
- (b) sea transport between ports in the same Member State;
- (c) air transport between the Community and third countries.

*Article 34***Implementing provisions**

The Commission shall be authorised to take such measures as may be appropriate in order to apply this Regulation. The measures may concern *inter alia*:

- (a) the introduction of a registration requirement for certain types of agreement;
- (b) the form, content and other details of complaints lodged pursuant to Article 7 and the procedure for rejecting complaints;
- (c) the practical arrangements for the exchange of information and consultations provided for in Article 11;
- (d) the practical arrangements for the hearings provided for in Article 26.

CHAPTER XI

TRANSITIONAL AND FINAL PROVISIONS

Article 35

Transitional provisions

1. Applications made to the Commission under Article 2 of Regulation No 17, notifications made under Articles 4 and 5 of that Regulation and the corresponding applications and notifications made under Regulations (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87 shall lapse as from the date of application of this Regulation.

The validity of decisions applying Article 81(3) of the Treaty adopted by the Commission under those Regulations shall come to an end no later than the date of application of this Regulation.

2. Procedural steps taken under Regulation No 17 and Regulations (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87 shall continue to have effect for the purposes of applying this Regulation.

Article 36

Designation of competition authorities of Member States

The Member States shall designate the competition authorities responsible for the application of Articles 81 and 82 of the Treaty, and shall take the measures necessary to empower those authorities to apply those Articles before ...

Article 37

Amendment of Regulation (EEC) No 1017/68

Regulation (EEC) No 1017/68 is amended as follows:

1. Article 2 is deleted.
2. In Article 3(1), the words 'The prohibition laid down in Article 2' are replaced by the words 'The prohibition in Article 81(1) of the Treaty'.

3. Articles 5 to 29 are deleted.

4. In Article 30, paragraphs 2 and 3 are deleted.

Article 38

Amendment of Regulation (EEC) No 2988/74

In Regulation (EEC) No 2988/74, the following Article 7a is inserted:

'Article 7a

Exclusion

This Regulation shall not apply to measures taken under Council Regulation (EC) No ... (*)

(*) OJ L ...'

Article 39

Amendment of Regulation (EEC) No 4056/86

Regulation (EEC) No 4056/86 is amended as follows:

1. Article 7 is amended as follows:

(a) Paragraph 1 is replaced by the following:

'1. *Breach of an obligation*

Where the persons concerned are in breach of an obligation which, pursuant to Article 5, attaches to the exemption provided for in Article 3, the Commission may, in order to put an end to such breach and under the conditions laid down in Council Regulation (EC) No ... (*):

— address recommendations to the persons concerned;

— in the event of failure by such persons to observe those recommendations and depending on the gravity of the breach concerned, adopt a decision that either prohibits them from carrying out or requires them to perform certain specific acts, or withdraws the benefit of the block exemption which they enjoyed.

(*) OJ L ...'

(b) Paragraph 2 is amended as follows:

(i) In point (a), the words 'under the conditions laid down in Section II' are replaced by the words 'under the conditions laid down in Regulation (EC) No .../...';

- (ii) The second sentence of the second subparagraph of point (c)(i) is replaced by the following:

'At the same time it shall decide, in accordance with Article 9 of Regulation (EC) No .../..., whether it accepts commitments offered by the undertakings concerned with a view, *inter alia*, to obtaining access to the market for non-conference lines.'

2. In Article 8, paragraph 1 is deleted.
3. Article 9 is amended as follows:
 - (a) In paragraph 1, the words 'Advisory Committee referred to in Article 15' are replaced by the words 'Advisory Committee referred to in Article 14 of Regulation (EC) No .../...';
 - (b) In paragraph 2, the words 'Advisory Committee as referred to in Article 15' are replaced by the words 'the Advisory Committee referred to in Article 14 of Regulation (EC) No .../...'
4. Articles 10 to 25 are deleted.
5. In Article 26, the words 'the form, content and other details of complaints pursuant to Article 10, applications pursuant to Article 12 and the hearings provided for in Article 23(1) and (2)' are deleted.

Article 40

Amendment of Regulation (EEC) No 3975/87

Articles 3 to 19 of Regulation (EEC) No 3975/87 are deleted.

Article 41

Repeals

Regulations No 17, No 141, No 19/65/EEC, (EEC) No 2821/71, (EEC) No 3976/87, (EEC) No 1534/91 and (EEC) No 479/92 are hereby repealed.

References to the repealed Regulations shall be construed as references to this Regulation.

Article 42

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Communities*.

It shall apply from ...

This Regulation shall be binding in its entirety and directly applicable in all Member States.
