

November 3, 1999

COMMENTS OF THE SECTION OF ANTITRUST LAW OF THE AMERICAN BAR  
ASSOCIATION ON THE EUROPEAN COMMISSION'S A WHITE PAPER ON  
MODERNISATION OF THE RULES IMPLEMENTING ARTICLES 85 AND 86 OF THE  
EC TREATY<sup>≅</sup>

The American Bar Association ("ABA") Section of Antitrust Law appreciates this opportunity to present its views on the European Commission's "White Paper on the Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty" (the "White Paper").<sup>1</sup> The views expressed herein are those of a Section Working Group on the White Paper.<sup>2</sup> They are being presented only on behalf of the Section and have not been approved by the ABA House of Delegates or the ABA Board of Governors and, thus, should not be construed as representing the position of the ABA.

The Section respects the Commission's critical appraisal of the application of Articles 81 and 82 of the EC Treaty and Regulation 17/62 and its intention to use enforcement resources more efficiently. Clearly, the White Paper's review and the proposals advocated therein have far reaching implications for the development and enforcement of the competition rules of the European Union (AEU<sup>≅</sup>) as well as the competitiveness of businesses throughout Europe. The Section hopes that the White Paper will promote a fruitful discourse on these issues which, in turn, will lead to improvements in the application and enforcement of the EU=s competition rules.

## **I. Summary of Comments**

As described more fully below, the Section generally endorses the Commission's proposal to render Article 81(3) directly applicable and eliminate the notification system for most transactions, but finds the proposal insufficient in and of itself. The Section believes that the proposed decentralization, if not clarified and modified, could have significant adverse effects on EU competition law and enforcement, particularly in relation to transparency, coherency and legal certainty. We accordingly focus our comments on those issues that we believe most troublesome, based on our experience with concurrent competition law enforcement in the United States. In particular, our comments address (i) the increased possibility offered by the proposed regime for forum shopping and inconsistent legal interpretation of Article 81; (ii) concerns related to available resources and experience of both the national and EU authorities; and (iii) procedural issues raised by the White Paper in relation to confidentiality and information exchanges with third-countries.

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<sup>1</sup> Based on changes adopted subsequent to the release of the White Paper, as part of the entry into force of the Amsterdam Treaty, the Section employs the new designations for Articles 85 and 86, respectively Articles 81 and 82, throughout the text of these comments. In addition, the Section refers to these Articles jointly as AEU competition law<sup>≅</sup> throughout the text of these comments.

<sup>2</sup> The Working Group is chaired by Frank L. Fine, and also includes Donald I. Baker, Pierre V.F. Bos, Elizabeth F. Kraus, Jon Ø. E. Midthjell, Peter M.A.L. Plompen, Mark Schechter, and Jacques Steenberg. The working group would like to thank Eleanor M. Fox and Kevin J. O'Connor for their cooperation.

Where possible, the Section offers recommendations to alleviate certain of the concerns raised. For example, in relation to forum shopping and coherency concerns, the Section believes that greater attention must be paid to the potential for inconsistent application of law among the Member State authorities and courts. The Section accordingly recommends procedural and systemic changes to promote harmonization among these differing enforcers, including: adopting a mechanism by which the competition authorities of the Member States and the Commission can improve coordination, training and understanding of competition law among and between themselves; increasing opportunities for the Commission to play a centralizing role by enforcing the European-wide effect of national decisions; and attaining greater procedural and remedial harmonization among the national courts as well as reform of the EU system for preliminary rulings. Moreover, the Section advocates certain actions concerning the resources, time and care needed to adopt the recommended mechanisms and procedures in order to ensure that the high standards of EU competition enforcement are maintained throughout the EU. In particular, the Section requests that necessary resources be provided to prospective EU competition law enforcers at both the EU and national levels and that the Commission phase-in the adoption of decentralized enforcement of Article 81. Finally, as concerns individual procedural issues raised by the Commission, the Section underscores that procedural safeguards of the fundamental rights of defense must be ensured before the adoption of any decentralization program.

## **II. The Commission's Proposed Reforms**

The convergence of EU enlargement, the Treaty goal of increased reliance on subsidiarity, and a clear lack of Commission resources for competition law enforcement, led the Commission to adopt the White Paper, which aims to reform and modernize the existing EU competition law enforcement system by shifting a substantial part of the existing burden to national authorities, national courts and the EU courts.

A clear focus of the White Paper is the Commission's lack of resources to carry out its overall enforcement responsibilities effectively. The Commission's exclusive power to grant exemptions to Article 81=s prohibition against restrictive practices is cited as the primary culprit for the Commission's insufficient resources.<sup>3</sup> This exclusive power was granted to the Commission early on, in an effort to ensure the coherent development of EU competition law. As enacted, Regulation 17/62 provided the Commission with the exclusive authority to grant such exemptions to notified agreements if, on balance, the agreement was considered pro-competitive, based on the factors provided in Article 81(3). While parties are not obliged to notify agreements, many do, seeking greater legal certainty for their agreements. This need to ensure greater legal certainty is due, in part, to the expansive interpretation given Article 81(1)=s prohibition by the Court and the Commission, leading to the possibility that many agreements will be perceived to violate Article 81(1) and thus be

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<sup>3</sup> The White Paper notes that Article 82 does not impose a similar constraint on Commission resources because EU competition legislation does not provide for the exemption of abuses of a dominant position. Therefore, the Commission receives only requests for negative clearances (official statements that the proposed actions do not amount to an abuse of a dominant position) in relation to this provision, which the White Paper states are much more limited in number and manageable for the Commission.

considered null and void in relation to Article 81(2). Therefore, from the outset of this procedure, the Commission was besieged by notifications. Moreover, the Commission's subsequent attempts to stem the tide of individual notifications, *e.g.*, by adopting interpretative notices and guidelines (including the *de minimis* notice) and assorted block exemptions (automatically exempting agreements meeting the requirements provided therein without notification) and by establishing a virtual Aquick look $\cong$  system in which the Commission issues a comfort letter (or non-binding statement from the Competition Directorate-General holding the agreement compatible with Article 81) instead of a formal decision, have proved insufficient.

Thus, the White Paper notes that between 1988 and 1998, notifications accounted for 58% of all new cases. The Commission rightly states that its attention to notifications, which generally involve pro-competitive agreements or practices, has limited the resources that it has available to focus on the more serious infringements of EU competition law, which generally are not notified.<sup>4</sup> The White Paper's reforms were proposed with this situation in mind. The goals of these reforms are to (i) permit the Commission to refocus its activities on eliminating the most serious restrictions of competition, (ii) provide for the decentralized application of Community competition rules, (iii) maintain consistency in competition policy throughout the EU, and (iv) ease administrative constraints on undertakings while providing them with sufficient legal certainty.

Based on these criteria, the White Paper reviews five different policy options:

- (i) adopting a rule of reason under Article 81(1), thereby minimizing the effect of Article 81(1)'s prohibition, and using the Article 81(3) factors to reconcile competition policy with other EU policies (which would require modification of Article 81(3) in its current form);
- (ii) decentralizing the application of Article 81(3) to permit national authorities to issue exemptions, basing case allocation either on a Center of gravity $\cong$  test or on sales thresholds (in which national authorities could apply national or EU competition laws to agreements depending whether the parties' combined sales fell below a specific threshold);
- (iii) waiving the notification obligation for a number of different types of agreements resulting in a limited number of notifications filed;
- (iv) simplifying exemption procedures to permit the Commission to administer notifications more effectively and expeditiously, including a proposal that would allow for automatic exemption of notified agreements that are not covered by block exemptions if the Commission does not oppose the agreement within a specified time; and
- (v) eliminating the prior notification regime and decentralizing EU competition

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<sup>4</sup> See *e.g.*, White Paper at para. 77.

law enforcement by rendering Article 81(3) directly applicable by national authorities.

In short order, the White Paper rejects the effectiveness of the first four options. Thus, Option 1, reading a rule of reason into Article 81(1), though it may most effectively address the problems faced by the Commission, is considered too drastic, as it may require a Treaty revision, and may create a risk of introducing additional non-competition factors into the Article 81(3) analysis. Moreover, Option 2, decentralizing the application of Article 81(3), is considered untenable due to its inability to reduce the number of notifications, the difficulties inherent in allocating cases under a center of gravity approach, and the likelihood that the Commission would retain the vast number of cases because national authorities would not be competent to act beyond their own territory.<sup>5</sup> Similarly, the sales threshold variant of this option is deemed flawed because it increases the possibility of forum shopping, by permitting parties to seek exemption from the Member State authority most likely to grant it, and risks the uniform development of EU competition law in cases of multiple notification to different Member States. As concerns Option 3, the White Paper rejects the idea of expanding the scope of Article 4(2) of Regulation 17/62 to waive the notification requirement for certain agreements, primarily because the Commission would retain exclusive jurisdiction over granting exemptions, which would deprive it of the resources necessary to permit it to concentrate on other enforcement objectives. Likewise, the White Paper's dissatisfaction with Option 4, procedural simplification, including the option for an expanded opposition procedure, is based on the undesirability of the Commission's exclusive jurisdiction which is considered to impede the Commission from reallocating its resources to more serious infringements.

Instead, the White Paper adopts Option 5, rendering Article 81(3) directly applicable, eliminating the notification system for most transactions, and granting national courts and national competition authorities competence to apply Article 81(3). Thus, once adopted, this option provides that all agreements would be legally enforceable until determined incapable of exemption based on the criteria of Article 81(3) by a competent authority (the Commission, the EU courts, national authorities or national courts). All block exemptions, including the forthcoming broad block exemptions covering vertical agreements, would maintain their status as a test of compatibility with Article 81(3). In an Option 5 world, the failure of a block exemption to apply would no longer entail the legal nullity of the agreement until it was notified and an individual exemption obtained. Rather, the agreement would remain valid and enforceable, even if it fell within the scope of Article 81(1), until it was proved by a competent authority, as described above, that Article 81(3) was not applicable to the agreement.

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<sup>5</sup> The Commission also notes that this option would hinder effective development of Community law in the national courts recognizing that national courts are required to cease to act if there is any chance that the underlying agreement or practice might be exempted under Article 81(3).

### III. Views of the ABA Antitrust Section

From a strict competition law perspective, the Section believes that Option 1, adopting a rule of reason under Article 81(1), would reduce most effectively the number of agreements falling within the purview of Article 81(1), which, in turn, would limit the number of notifications to be reviewed by the Commission and permit the Commission to refocus its resources on serious violations of competition law.<sup>6</sup> By retooling the interpretation of Article 81(1) accordingly, the Commission would retain exclusive enforcement powers over Article 81(3) but would no longer require the extensive resources currently necessary to discharge these enforcement functions. From the vantage point of pure competition policy, the Section believes that this approach would prove most advantageous. It would permit the Commission to refocus the use of its resources, without undermining the coherent interpretation of EU competition law that the Commission's exclusive enforcement power over Article 81(3) ensures, and without risking forum shopping and duplicative national investigations, which unfortunately flow from a decentralized system of enforcement.

The rule of reason is the prevailing standard of analysis of restraints of trade under Section 1 of the Sherman Act in the United States.<sup>7</sup> One of the significant benefits found in employing the rule of reason standard in the United States is that a majority of restraints do not require substantial analysis, thereby permitting enforcement authorities to focus their attention on more difficult or important issues. As such, the rule of reason affords business the opportunity to adopt novel, efficiency-enhancing activities and practices, while ensuring that enforcement agencies and/or private litigants have adequate opportunity to attack anti-competitive practices.<sup>8</sup> Moreover, in the U.S., consideration of non-competition factors in a rule of reason analysis is precluded.<sup>9</sup> We believe that the adoption of a similar rule of reason standard in relation to the Commission's Article 81(1) analysis would reduce the often complained of straight-jacket effect of the current regime on EU business and permit the Commission to use its resources more effectively to concentrate on restraints likely to restrict competition in the EU, without engendering issues of forum shopping brought on by decentralization.

However, the Section understands that the adoption of such a reform may require Treaty revision, which might not be considered politically feasible in the near term. Moreover, the Section also recognizes that the White Paper's reform program may be motivated in part by a desire to promote decentralization, irrespective of workload

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<sup>6</sup> This approach is consistent with the recommendations advocated in the Comments of the Section of Antitrust Law and the Section of International Law and Practice of the American Bar Association on the European Commission's Green Paper on Vertical Restraints in EC Competition Policy, submitted to the European Commission in July 1997. These comments may be found on the websites of the Antitrust Section and its International Committee.

<sup>7</sup> *Continental T.V. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977).

<sup>8</sup> See generally forthcoming ABA Section of Antitrust Law, MONOGRAPH 23, THE RULE OF REASON (1999) for analysis of the rule of reason as employed in the United States, a copy of which is being provided with these comments.

<sup>9</sup> *National Society of Professional Engineers v. United States*, 435 U.S. 670 (1978).

considerations. Thus, assuming that a rule of reason revision of Article 81(1) will require protracted Treaty revision and that the goal of decentralization cannot be severed from the enforcement of competition law, then the Section agrees that Option 5, rendering Article 81(3) directly applicable, is the next best proposed alternative. Based on these assumptions, the Section generally supports this last option. However, our experience with the U.S. concurrent federal and state antitrust enforcement system leads us to question certain ideas upon which the White Paper is based, particularly in relation to decentralized enforcement. In the United States, a number of issues have arisen as a result of dual enforcement of the antitrust laws by both the federal government and the states, including differences in enforcement philosophy and actual enforcement, differences in the nature and quality of investigations and analysis due to varying levels of resources and experience, and the potential for multiple investigations of the same agreement.

Based on this experience, we turn our attention to three major concerns with Option 5: the issue of forum shopping and the coherency of Member State legal interpretation of Article 81; the availability of necessary national and European resources; and additional procedural concerns raised by the White Paper, as well as recommendations to minimize the risk of their negative impact, where applicable.

#### **A. Forum Shopping and Coherency Concerns**

(i) *Forum shopping and coherency of legal interpretations as between national authorities*

The Section's main concerns relate to the possibility that decentralization could lead to extensive forum shopping and inconsistent legal interpretation of EU competition law. To date, the Commission's exclusive enforcement of Article 81(3), even though procedurally burdensome, has provided legal coherency as well as sufficient legal certainty for businesses operating in the EU. The Section fears that the proposed devolution of enforcement could engender forum shopping, due to the disparate procedural rules and enforcement experience of each of the Member States. These concerns are based on our experience in the United States with concurrent federal and state competition law enforcement, described more fully throughout the text of these comments.<sup>10</sup>

For example, as concerns forum shopping, our experience demonstrates that plaintiffs may choose particular EU countries in which to bring a complaint based on procedural rules, such as liberal access to the file, or stricter standards of enforcement by the authorities. In the United States, we have witnessed significant differences in enforcement and enforcement philosophy between the federal antitrust agencies and the states as well as between the state enforcers themselves, which has led to substantial complications and forum shopping for >active= or >passive= authorities regarding competition law investigations.<sup>11</sup> Moreover,

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<sup>10</sup> These issues are discussed in detail in ABA Antitrust Section, MONOGRAPH NO. 21, STATE MERGER ENFORCEMENT 65-88 (1995), a copy of which is being provided to the Commission with this paper.

<sup>11</sup> There have been significant differences in enforcement philosophy at various times between the federal antitrust agencies and the states. This was most notable during the 1980s, when the federal antitrust agencies failed to enforce the laws governing vertical restraints, but state attorneys general took a completely different approach. Compare DOJ *Vertical Restraint Guidelines*, 4 Trade Reg. Rep. (CCH) & 13,105 (1985) with

complainants also might favor Member States that display a prejudice for or against industrial policy concerns, *e.g.* the creation of national champions, or other matters unrelated to competition policy, such as local employment effects. This has occurred in some instances in the United States where state attorneys general, who are usually elected officials subject to influences unrelated to competition law -- such as local political considerations, local economic conditions and local employment -- have permitted these factors to affect their competition law enforcement decisions.<sup>12</sup> Whereas the Commission's proposed centralizing functions may help to limit such concerns, decentralization of EU competition law, by its very nature, will afford differing parties opportunities for forum shopping. In addition, forum shopping is encouraged by the lack of detail as to how the White Paper's proposed system is to function and particularly, how third parties are to have access to obtain remedies.

On a related issue, the Section notes that the decentralized enforcement of EU competition law raises the specter of inconsistent legal interpretation by the Member States. In particular, the Section is concerned that agreements with cross-border effects that are not examined by the Commission could be subject to conflicting decisions by national competition enforcers in affected Member States. This is due, at least in part, to the jurisdictional limitations to which these authorities are subject, *i.e.*, each being confined to assess the agreement or transaction in relation to its effects solely on the territory of the individual Member State. Thus, the Section believes that the national competition authorities could well arrive at differing conclusions regarding identical agreements with similar effects in each State, based on their vastly different enforcement procedures, available resources, and expertise,<sup>13</sup> such that an agreement, *e.g.*, a multi-state distribution contract, could be approved by one Member State and be deemed to violate Article 81 by another. Such inconsistent interpretations would fracture the cohesive nature of EU competition law along national boundaries.

In addition, multiple Member State investigations regarding the same agreement or

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*National Association of Attorneys General Vertical Restraint Guidelines* (1988) and *NAAG Vertical Restraint Guidelines*, reprinted in 4 Trade Reg. Rep. (CCH) & 13,5400 (revised 1988 & 1995). These differences in enforcement philosophy created tensions between federal and state antitrust enforcers. See ABA Section of Antitrust Law, MONOGRAPH NO. 15, ¶ANTITRUST FEDERALISM: THE ROLE OF STATE LAW 5-8 (1988). Such diverging enforcement philosophies have led to differences in enforcement, such as the decision by the New York Attorney General to challenge the merger of cereal manufacturers after the FTC cleared the merger. *New York v. Kraft General Foods, Inc.*, 1993-1 Trade Cas. (CCH) & 70,284 (S.D.N.Y. 1993) (state failed to prove likely anticompetitive effects). Moreover, differences in enforcement philosophy also exist as between the different state enforcers in the United States. See MONOGRAPH NO. 21, STATE MERGER ENFORCEMENT 70-71.

<sup>12</sup> See *e.g.*, *Pennsylvania v. Russell Stover Candies, Inc.*, 1993-1 Trade Cas. (CCH) & 70,224 (E.D. Pa. 1993) (Attorney General of Pennsylvania challenges the merger of two candy manufacturers principally because the merger would result in the closing of a plant and the loss of jobs in Philadelphia.); MONOGRAPH NO. 21, STATE MERGER ENFORCEMENT at 36 & 70 n.345. See also the NAAG Merger Guidelines (reflecting that non-competition consequences may affect the Attorneys General's ultimate exercise of prosecutorial discretion) *NAAG Horizontal Merger Guidelines* ¶ 2.

<sup>13</sup> For example, whereas Germany has a longstanding competition enforcement regime, countries such as Luxembourg and Austria do not have national competition authorities and the newly associated countries have extremely limited experience and resources dedicated to competition law enforcement. In addition, numerous procedural differences exist between the Member State enforcement regimes, *e.g.*, the discovery system of the United Kingdom is more far-reaching than those of most continental European Member States.

transaction would likely be an inefficient use of Member State authorities= resources and unduly burden the respondent. In the United States, for example, independent enforcement by both the federal agencies and state attorneys general has resulted in increased costs to both the parties to the investigations and to the government. For example, multiple consent decrees are often laboriously negotiated and entered - some in federal court and others in state courts. Moreover, multiple copies of documents and interrogatory answers must be produced to both federal and state enforcers, which invariably leads to higher costs on the parties.<sup>14</sup>

As the Commission examines the proposed modernization plan, we hope that it will keep these concerns in mind and endeavor to eliminate or minimize them, in part, by adopting the recommendations proposed below. While our comments focus on the decentralized enforcement of Article 81, we note that the procedures and mechanisms that we recommend in relation to Article 81 also can be used effectively in relation to consistent national enforcement of Article 82.

### *Recommendations*

The White Paper, while raising a number of these coherency issues, generally focuses on the potential for inconsistent application of EU competition law as between the Commission and the Member States. The White Paper does not raise the issue of possible inconsistent interpretation as between the Member States themselves.<sup>15</sup> Thus, the proposed remedies found in the White Paper<sup>16</sup> appear insufficient to address the forum shopping and coherency issues raised above, particularly because they fail to create the necessary feedback loops and enforcement mechanisms among the Member States.

The Section believes that before adopting a decentralized EU competition law enforcement system, the Commission should assist the Member States in creating mechanisms that at least will enhance the likelihood that the proper channels of communication for joint enforcement are developed among the Member States. Such mechanisms can help to reduce forum shopping and inconsistent legal interpretations. To this end, the Section proposes the adoption of a European coordinating association. The intention of such a forum, which could be implemented in association with the White Paper=s proposed reinforcing of the Advisory Committee, is to increase the number of circumstances in which the national competition enforcers work together as sovereigns to develop consensus on competition issues, including, where practicable, close cooperation on joint enforcement as to multi-state agreements and procedural harmonization of national enforcement mechanisms. This is explained more fully below. In addition, recognizing that such a forum is of itself insufficient to cure the potential for forum shopping and incoherent decisions, the Section believes that it would be beneficial for the Commission to provide

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<sup>14</sup> Monograph No. 21, State Merger Enforcement at 71-73.

<sup>15</sup> See e.g., White Paper at Chapter II, IIB.

<sup>16</sup> These include proposals for Member State authorities to be obliged to contact the Commission when applying Articles 81 and 82, allowing the Commission to take cases out of the national competition authorities= jurisdiction, and reinforcing the role of the Advisory Committee on Restrictive Practices and Dominant Positions by making it a full-scale forum.

training for the Member State authorities as well as the opportunity for these authorities to consult Commission staff. This, in combination with a strong Commission centralizing role, explained below, would help to ensure that the Commission's EU competition law enforcement expertise is made available to all national enforcement agencies and that these agencies are capable of effective EU competition law enforcement.

The Section also recognizes the importance of the Commission's role as a centralized enforcement agency of EU competition law with the power to remove cases from the jurisdiction of national enforcers in order to exercise exclusive control over important issues of EU-wide concern. Thus, as noted below, the Section supports the White Paper's proposal for the Commission to retain its ability to remove cases from the jurisdiction of the national competition authorities by means of a mechanism equivalent to Article 9(3) of Regulation 17/62. Moreover, the Section suggests additional methods by which the Commission could play a centralizing role. However, the Section believes that the White Paper's focus on the Commission's role as the exclusive coordinator of multi-state enforcement activities can also serve to vitiate the goal of decentralization and increase the Commission's enforcement burden unnecessarily. Therefore, the Section also recommends that the Commission draw up guidelines explaining the situations in which it is likely to claim exclusive jurisdiction, in order for the Member States' authorities and third parties to understand better the roles of the respective enforcers in the new concurrent enforcement system.

#### A European coordinating association

The Section believes that the U.S. experience with the National Association of Attorneys General ("NAAG") in the United States offers some guidance as to the type of mechanism required within the EU context to minimize forum shopping and coherency concerns while promoting enforcement efficiency at the national level. Provided below is a description of the NAAG, including the benefits and shortcomings of such a mechanism.

The NAAG is an association of the chief enforcers from each of the 50 states as well as several territories and commonwealths of the United States (the attorneys general) which was established in 1907 to promote communication among the individual enforcers. The Multistate Antitrust Task Force (the AMATF<sup>17</sup>) is a permanent NAAG subcommittee dedicated to antitrust issues, which permits its sovereign members to work together to develop consensus on antitrust related issues from multi-state enforcement, to writing *amicus curiae* briefs to lobbying for proposed legislation.

As with any organization comprised of sovereign jurisdictions, not all differences can be resolved through a non-binding system of collaboration and cooperation. Enforcement priorities and interests, which are subject to complex and varied political and philosophical approaches, often cannot be reconciled, and as indicated above, differences have and do arise between the federal antitrust agencies and the states as well as between the states themselves.<sup>17</sup> The result often can be a patchwork consensus formed around those jurisdictions with the strongest and most vocal interest in a particular issue. Nevertheless,

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<sup>17</sup> See *supra* at fn. 11.

some level of consistency and coordination profitably can be achieved by such an organization.

As concerns non-merger enforcement, for example, the NAAG (and the MATF in particular) provides each of its associated enforcers with the ability to communicate with one another at an early stage, once one of the enforcers, or the NAAG itself, is made aware of the potentially infringing behavior. Via this mechanism, the interested enforcers can, and do, exchange analyses and information, agree to share the burdens of an investigation, use experts and prepare cases jointly, if warranted, generally agreeing upon a lead enforcer to eliminate duplicative enforcement action. In addition, the NAAG and the MATF provide for joint training and conferences and set the stage for the development of a common understanding of individual subject areas via their working groups on particular issues, *e.g.*, telecommunications, health care, and cable television. The group also provides a means of interaction between the federal and state enforcers through the Executive Working Group for Antitrust (the AEWG<sup>18</sup>). The EWG permits representatives of the Department of Justice, the Federal Trade Commission, and the state attorneys general to discuss antitrust enforcement generally and to coordinate overlapping state and federal enforcement activities in order to reduce, to some extent, duplicative enforcement efforts.

In the United States, these and other efforts promote the sharing of expertise and information (to the extent permitted by law) and more efficient use of the state enforcers' resources while also helping to build consensus among the federal and state antitrust authorities, thereby allowing for some measure of increased enforcement consistency. In addition, such a system can reduce the burden on non-state actors, *e.g.*, complainants and respondents, by affording them the possibility of coordinating with one lead authority rather than a multitude of enforcers, thereby facilitating coordination and communication throughout the investigation.

While we recognize that such a forum, operating on the basis of consensus, is not a panacea and will not eliminate the risks of forum shopping and interpretative inconsistency from the White Paper's decentralization proposal, it can help to reduce these risks. Moreover, a European coordinating association for EU competition law is particularly warranted as it would help to empower the Member State authorities, by raising their general level of expertise and knowledge, and permit them to rely less heavily on the Commission, thus furthering the goal of decentralization and permitting the Commission to concentrate its activities on other issues. This type of mechanism also would allow the Member State authorities a forum in which to discuss and determine necessary national procedural harmonization. In addition, such an association will help the Member State authorities to react in a coordinated manner to the initiatives adopted as part of the Commission's proposed increased reliance on interpretative guidelines and notices.<sup>18</sup> Such guidelines and notices are not binding on national authorities; however, the association could be used by these authorities as a means of discussing and determining how to adapt to and account for the guidelines in order to reach greater consistency between the central and Member State enforcement authorities. Finally, this type of association would provide the Commission with a neutral forum in which to provide training and enforcement expertise to the Member

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<sup>18</sup> See *e.g.*, White Paper at para. 86.

State authorities.

In sum, the Section believes that a mechanism promoting communication and interaction between the Member States is a necessary, though incomplete, adjunct to the White Paper=s proposed concurrent enforcement system. The proposed European coordinating association easily could be adapted and applied to the proposed decentralization program within the European Union. In fact, such an association could be adopted as part of the White Paper=s proposal to reinforce the Advisory Committee as a full-scale permanent forum. In order to provide for a smooth transition to decentralization, we believe that such an association should be functioning before the entry into force of concurrent enforcement to allow the Member States, as well as the Commission, the necessary time to develop preliminary rules for, *inter alia*, interaction, investigation, and mutual recognition which will permit the decentralization to function effectively. For example, before Member States commence decentralized enforcement, the Section believes that their authorities will need to agree upon norms for approaching Article 81 cases, *e.g.*, timing of investigations, and find acceptable procedures for, *inter alia*, sharing information (while maintaining the confidentiality that is essential to enforcement), as well as addressing the harmonization of national procedural rules such as those relating to discovery. Such actions can be discussed conveniently via the proposed association, although we recognize that this type of mechanism will not guarantee harmonization and that more concrete procedural harmonization actions may be required. During this initial period, the Commission can provide necessary training to the Member State authorities as well as the opportunity for these authorities to consult Commission staff via this neutral association. In fact, at the outset of such cooperation, we believe that it may be beneficial for the Commission to work jointly with the national authorities on a number of initial matters to ensure the effectiveness and coherency of decentralized enforcement. Such interaction between the Commission staff and national enforcers will help in transferring the Commission=s EU competition law enforcement expertise to all national enforcement agencies and aid these authorities in acquiring the necessary tools to facilitate decentralization. This is likely to be particularly crucial to the authorities of the seven Member States that are not yet permitted to enforce EU competition law generally.<sup>19</sup>

#### Commission=s continuing centralizing role

A second factor that will help to minimize concerns of forum shopping and coherency is the ability of the Commission to take unilateral control of a case involving multi-state effects, in a manner similar to its powers currently held under Article 9(3) of Regulation 17/62. However, if the Commission were to rely on this power too frequently, it would vitiate the goal of decentralization. Moreover, without defined guidelines as to the situations in which the Commission is likely to remove a case from national jurisdiction, complainants and respondents will not know the appropriate forum in which to bring actions or raise issues. Thus, the Section recommends that the Commission clarify the instances in which it is likely to take over control of a case via new guidelines and that any such guidelines be made publicly available before the entry into force of the concurrent enforcement system, in order to ensure that the Commission and state enforcement officials understand and abide by the

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<sup>19</sup> See fn. 27 *infra* and accompanying text.

new system.

In addition to the foregoing mechanism, the Section could envisage the Commission adopting additional centralizing roles. For example, in order to give the decisions of individual national authorities European-wide effect, an opposition procedure could be adopted in which the national authority and/or the affected parties would forward a copy of the national decision to the Commission or the proposed European coordinating association. The decision would then be circulated to the antitrust authorities of each EU Member State. If these authorities were not to voice opposition to the decision within a certain period of time (*e.g.*, two months) the decision would be considered to have European-wide legal effect, automatically. Thus, the Member State authorities would be barred from acting inconsistently with the decision as long as the facts remained substantially similar to those on which the decision was based and the Commission would be responsible for ensuring such EU-wide legal effect. Moreover, if one or more Member States were to oppose the decision, then the Commission could step in to endorse the decision, thereby endowing it with European-wide legal effect. Such a mechanism would greatly reduce the possibility of the inconsistent application of EU competition law to individual agreements without abrogating the goal of decentralized enforcement.

In addition, the Section advocates that the Commission (perhaps in conjunction with the national authorities) introduce a system of advisory opinions. Such opinions could serve a role similar to the Commission's current Acomfort letter practice, with opinions issued in response to requests by the parties to an agreement instead of in response to notifications requesting exemption. These opinions would continue to allow the parties to an agreement to have an opportunity to request the Commission's views on an agreement either before or at an early stage of its entry into force, thus providing the parties with greater legal certainty at this critical stage.<sup>20</sup> Moreover, the Commission could publish or make such opinions available on the Internet to provide a more complete body of law regarding the interpretation Article 81, similar to the manner in which the U.S. Federal Trade Commission and Department of Justice make their equivalent opinions (advisory opinions and business review letters) publicly available. Conceivably, procedural safeguards could be adopted to reduce the likelihood that the Commission will be flooded with requests for such opinions. The adoption of such an advisory system is likely to prove particularly helpful to assuage the fears of EU business that the White Paper's proposals do not provide sufficient legal certainty.<sup>21</sup>

(ii) *Forum shopping and coherency of legal interpretations relating to national courts*

The Section also has grave concerns regarding issues of forum shopping and consistent legal interpretation of EU competition law in relation to the national courts. The Section notes that the issue of forum shopping vis-à-vis national courts may appear less significant due to the Brussels and Lugano Conventions. These Conventions endeavor to consolidate a multi-state claim to the courts of one single Member State while preventing

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<sup>20</sup> Both the United States Federal Trade Commission and the Department of Justice, have similar mechanisms.

<sup>21</sup> These views of business are based solely on informal surveys of national enforcers in Germany and the United Kingdom described, by national enforcers, on an anonymous basis. The Section anticipates that European businesses and business associations will submit comments on the White Paper addressing the issue of legal certainty, in part.

courts in other Member States from hearing the same case. In addition, these Conventions also attempt to neutralize conflicting decisions by compelling courts in the Member States that do not hear the case to give full effect to a decision of a Member State court competent to hear the case. However, even with these Conventions in place, forum shopping concerns arise, particularly due to the differing procedural (*e.g.*, standing and discovery) and remedial (*e.g.*, injunction or damage) rules of each of the Member State court systems, as well as differing standards of enforcement (*i.e.* *Aharsh* versus *Alax* judiciaries).

In particular, the Section notes that forum shopping may occur due to the lack of harmonization of procedural rules among the Member States applying Articles 81 and 82. Thus, for example, standing rules may cause certain Member State courts to be considered Plaintiff friendly, *i.e.*, permitting consumer associations to claim damages on behalf of a member, and discovery rules may cause certain Member States to be deemed Defendant friendly, *i.e.*, by limiting the discovery permitted by the plaintiff.

Forum shopping is also encouraged by differences in national regimes regarding remedies, including injunctions and damages. The Section notes that the Member State rules regarding remedies are not harmonized. National courts may grant injunctions and award damages in accordance with their domestic laws, and even claims based on Community law are treated in the same manner as claims under national law. Furthermore, Article 81(2) provides that agreements violating Article 81(1) are automatically void, but leaves it to national law to decide the effect of the nullity. To the extent that the provision of remedies by a national court appears more attractive to either a defendant or a plaintiff, the Section foresees not only opportunities but also incentives for forum shopping.

Varying standards of national antitrust enforcement also may result from differences in antitrust education among national judiciaries, differences in resources, differences in breadth of case load, and even cultural differences as to the role of antitrust in the national economy concerned or the role played by non-competition issues (*e.g.*, local employment) in competition law decisions.

The aforementioned Conventions may even exacerbate such opportunities and incentives for forum shopping insofar as they provide that the decision of a Plaintiff-friendly court will be given full effect by other national courts. That is, the current system, if applied to EU competition law, could lead to increased strategic litigation in relation to competition concerns heard by the national courts. For example, the decentralization proposed by the White Paper, in combination with the system imposed by these Conventions, may well cause potential defendants (*i.e.*, parties to an agreement) to seek a declaratory judgment as to the permissibility of their own agreement under Article 81 at an early stage in a more Defendant-friendly national court as an offensive tactic to attempt to "pre-clear" the agreement and thereby preclude subsequent challenge in other Member State courts.

Moreover, the Section underscores the potential for national courts to arrive at distinctly different interpretations as to the applicability of Article 81(3), which we fear will result in inconsistent interpretations of Article 81 on a country-by-country basis. As a general matter, the Section notes that Member State courts are less experienced than their national competition authority counterparts in balancing the factors found in Article 81(3).

Furthermore, in contrast to the national competition authorities, the national courts generally are more dependent on facts and arguments raised by the parties and have less developed procedures for independent fact finding as relates to issues of competition law. Thus, the Section anticipates that the national courts could interpret the law and facts in any Article 81(3) analysis differently from even their national competition authority counterparts, and differently from one another. The potential for conflicting judgments is exacerbated by the fact that most Member States do not have either specialized judiciaries for dealing with antitrust claims, or a judicial body with exclusive jurisdiction over Afederal EU claims.≡

The Section also notes that pursuant to the Brussels and Lugano Conventions, a Member State court is not required to recognize another Member State court=s decision if that decision is found to violate public policy. Thus, where a court in one Member State has held an agreement or practice compatible with Article 81(3), courts in other Member States may disagree as a matter of law. Depending upon national law, the decision of the first court may be found to violate public policy by another court, which would lead to non-recognition of the first court=s decision by the second, in turn likely leading to inconsistent interpretations by differing national courts.

The Section recognizes that in order to avoid interpretative inconsistency, the national courts are permitted (and in some cases required) to refer questions regarding the interpretation of Community laws to the European Court of Justice (AECJ≡) pursuant to Article 234 (*ex* Article 177) of the EU Treaty. Whereas this preliminary ruling mechanism supports a coherent legal interpretation of EU law, the Section notes that this system may not ensure sufficient coherency in relation to Article 81(3). For example, until a case before a national court reaches the highest level of appeal in the national system, which often requires many years, the judge concerned is not obliged to refer EU legal questions to the ECJ and can decide these questions him- or herself. Clearly, this process provides the individual Member State courts with significant interpretative opportunities to arrive at different conclusions on the same set of facts presented in relation to Article 81(3).

In addition, the Section notes that the system for preliminary rulings is a slow means of ensuring a coherent interpretation throughout the Community. According to the ECJ, the average duration of a preliminary reference proceeding in 1998 exceeded 21 months.<sup>22</sup> Thus, the Section believes that reliance on the preliminary reference mechanism to secure consistent interpretation and application of Article 81 by the national courts may be insufficient.

The White Paper advocates additional Commission cooperation with national courts to secure the coherent interpretation of Article 81 as a means of addressing these legal coherency issues. To this end, the White Paper proposes that (i) national courts be required to notify the Commission of proceedings in which EU competition law is invoked; (ii) the Commission be afforded the opportunity to intervene in national court proceedings as *amicus curiae*; and (iii) the Commission permit national courts to approach the Commission for

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<sup>22</sup> AThe Future of the Judicial System of the European Union (Proposals and Reflections),≡ submitted to the Council of Ministers of Justice and Home Affairs on May 28; 1999, at p. 29; available on the ECJ website (<http://curia.eu.int/en/pres/aveng.pdf>).

information of a procedural, legal or economic nature.<sup>23</sup> Although the Section recognizes that these measures would help to mitigate the danger of incoherent interpretations, there is considerable doubt as to whether these procedures are sufficient. As discussed further in Section B, without adequate resources allocated, these measures could overburden the Commission significantly. Moreover, national courts might be reluctant to take advantage of such measures and may choose not to seek guidance or information from the Commission.

### *Recommendations*

As with the Section's recommendations relating to the national competition authorities, our recommendations concerning the national courts, below, focus on increasing the harmonization among the courts' procedures in an effort to reduce forum shopping and inconsistent legal interpretations in relation to Article 81. If employed in combination with the proposals advocated in the White Paper, our recommendations should help to minimize such concerns in relation to the national courts.

#### Increased harmonization of national procedural rules

The Section anticipates that increased harmonization of national procedural rules will help to minimize forum shopping. One option to achieve this goal would be to require outright harmonization of the Member State remedial and procedural rights related to national courts' enforcement of EU competition law generally. Although such a step may be considered drastic, it would decrease incentives for forum shopping. Such a harmonization program would also permit, to a limited and, perhaps insufficient extent, increased consistency of the national courts' legal interpretations by permitting each Member State court access to the same information as part of the discovery process. The Section members have had positive experience with the use of unified federal court procedures employed in the various federal courts throughout the United States in the enforcement of the United States' antitrust rules, and support the harmonization of national court procedures throughout the EU in an effort to apply EU competition law uniformly. The Section does not advocate the adoption of a federal judiciary, let alone a federal antitrust enforcement system, at this stage of development of EU law. However, we draw attention to the fact that in the absence of such federal enforcement mechanisms, great care must be taken in relation to harmonization of national procedures, interpretation and training programs to ensure the coherent enforcement of EU competition law by the national courts.

Alternatively, the Section recommends amending the Brussels and Lugano Conventions, to insert a new chapter regulating the jurisdiction and enforcement of EU competition law. This may well prove a less cumbersome means of minimizing the risk of forum shopping in comparison to the foregoing option, though is unlikely to be as effective as total procedural harmonization in closing all of the gaps between national court procedures. However, at a minimum, the Section suggests that any such chapter provide for the exclusive jurisdiction of a single national court, perhaps chosen on the basis of a center of gravity test, in relation to Article 81 concerns raised by a particular agreement in an

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<sup>23</sup> See White Paper at para. 107.

effort to avoid conflicting judgments on a single agreement.<sup>24</sup> Moreover, to reduce subsequent forum shopping, the chapter should establish that a Member State court cannot hold another national court's decision regarding Article 81(3) contrary to public policy, and therefore unenforceable within its jurisdiction. In addition, the chapter should provide a uniform rule on standing concerning EU competition law proceedings before national courts. In toto, such a minimalist approach to harmonization of the procedures and approaches of national courts also should help to reduce forum shopping.

Either of these options can be combined with other proposals aimed at reducing interpretative inconsistencies of national courts in relation to EU competition law, such as the proposals adopted in the White Paper relating to the Commission's *amicus curiae* role and the possibility for national courts to obtain information from the Commission.

#### Reforms of the preliminary ruling mechanism

The Section believes that additional procedures aiming to minimize inconsistent interpretations of Article 81 by national courts are required as well. In particular, in addition to the proposals adopted in the White Paper, the Section supports certain proposals related to reforming the preliminary ruling mechanism, already suggested by the ECJ and the Court of First Instance (AEU Courts) to increase such consistency.

In a recently released document, the EU Courts offer suggestions to rationalize and modernize the EU Court system.<sup>25</sup> As part of these generally applicable recommendations, the EU Courts offer alternative proposals to make the preliminary ruling mechanism more accessible and rapid. One such recommendation proposes the creation or designation, in each Member State, of decentralized judicial bodies responsible for handling references for preliminary rulings from courts within their area of territorial jurisdiction. Moreover, to prevent discrepancies as between these individual regional courts, the proposal would allow these courts to refer questions of general relevance to the unity or development of Community law. In addition, the proposal recognizes the need for a right of appeal "on a point of general legal interest" to the ECJ to maintain the uniform interpretation of EU law. Alternatively, the EU Courts note that the Court of First Instance should be granted subject-matter jurisdiction over preliminary references, to assist the ECJ with such references in an effort to make the system more responsive to the needs of the national courts.

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<sup>24</sup> Of course, the Commission would retain the centralization powers discussed in paras. 102 & 103 of the White Paper to prevent inconsistent or idiosyncratic court decisions.

<sup>25</sup> See "The Future of the Judicial System of the European Union (Proposals and Reflections)," cited *supra* note 22.

The Section anticipates that as a general matter, such reform will help to ensure greater consistency of national court interpretation of EU law in an expedited fashion.<sup>26</sup> The Section, therefore, supports the adoption of such reforms in addition to the proposals advocated above and those adopted in the White Paper. In toto, the adoption of such a reform package should minimize both the concerns of forum shopping and inconsistent interpretation raised in relation to the national courts. However, as noted below, the Section believes that the adoption of such proposals will require an extensive shifting of resources and a significant transition period to permit the national and EU courts to accommodate such changes and allow for the proposed system to function effectively.

## **B. National and EU Resources**

As noted above, the White Paper addresses neither the manner in which the proposed reform may be expected to impinge on the resources of national and competition authorities and courts nor the effect of decentralization on the resources of the EU Courts or even those of the Commission itself. However, the Section emphasizes that the success of decentralization is dependent on necessary resources being made available both by the Member States and the Community institutions involved. This issue must be addressed prior to decentralization. The White Paper=s proposed decentralization shifts a major portion of the enforcement burden to the national authorities, which are required to pursue a number of additional roles, and the Section believes that many national competition authorities (particularly the newly established regimes) may not have sufficient resources or enforcement experience to carry out such responsibilities immediately.

Moreover, the White Paper=s proposed decentralization is likely to place additional burdens on the EU institutions and particularly the EU Courts. Recognizing that the EU Courts currently are contemplating structural reforms due to insufficient resources, these courts do not appear prepared for the additional burdens anticipated as part of the White Paper=s proposed decentralization either. The proposed decentralization also will place additional burdens on national courts and national competition authorities. Already, a number of officials from the national competition regimes have voiced concern about the additional responsibilities to be imposed on national enforcers as part of the White Paper=s proposal. It appears that many of the national authorities may be too understaffed and/or have too limited experience in enforcing national and particularly EU competition law to be in position to carry out such decentralized responsibilities effectively on entry into force of any such proposal.<sup>27</sup>

In addition, the White Paper=s proposal creates additional responsibilities and burdens for the Commission. For example, the proposed regime would replace the Commission=s responsibility for Article 81(3) exemptions with that of ensuring consistency of Member State application of EU competition law. This centralizing role would involve a

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<sup>26</sup> The Section also notes that the adoption of specialist antitrust courts or tribunals, as relied on in Canada, has been debated, though not yet accepted, in the United States and that this option may be considered worth exploring by the EU and its Member States due to the potential benefits that such courts or tribunals can offer, including focused attention on competition law as well as possible increases in efficiency and consistency.

<sup>27</sup> For example, the Commission itself notes that the competition authorities of seven Member States are not even authorized to apply EU competition law currently. *See* White Paper at para. 94.

number of tasks including processing and responding to national submissions (*e.g.*, required as part of the proposed notices of initiation of procedure), preparing materials necessary for intervention as *amicus curiae* in national judicial proceedings, and training national authorities.

Similarly, the proposed decentralization will cause Article 81(3) to become directly applicable and thus capable of enforcement as between private parties in national courts. This is likely to lead to significant increases in the workload of the Member State courts responsible for hearing such cases. Moreover, as noted above, the Section is concerned that these courts do not have the necessary resources or training to accommodate such an immediate influx of EU competition law cases. In addition, the examination of such cases by national courts is likely to lead to increased referrals from these courts to the ECJ regarding a wealth of issues related to EU competition law enforcement, *inter alia*, the applicability of the Commission's anticipated guidelines as well as issues related to particular agreements. Such additional responsibilities would arise just as these EU institutions are trying to find alternative means of dealing with anticipated increased workloads brought on by EU enlargement and, thus, at a time at which the institutions do not appear to be in a position to accommodate the burden.<sup>28</sup>

Recognizing the extensive resources necessitated by the proposed decentralization, the Section recommends that the EU and its Member States ensure that necessary resources be allocated to each of the prospective enforcers both at the Community and national level, before the adoption of any decentralization plan. Moreover, the Section advocates that the Commission adopt a phased-in approach to decentralization to minimize the initial impact and burden on each of the affected institutions. Such a phased-in approach will permit the national authorities the time necessary to become acclimated to their new enforcement powers and procedures. Moreover, such phased-in decentralization also will permit both the Commission and the Member States the opportunity to test and develop concurrent enforcement without jeopardizing overall competition law enforcement in the EU, as might occur in an "all or nothing" context.

### *Recommendations*

#### Resources and phased-in decentralization

As examined above, the proposed modernization program does not decrease the resources necessary to effectively enforce EU competition law but rather shifts the enforcement burden to a number of differing actors. Without ensuring that the necessary resources are allocated to prospective enforcers and courts at both the EU and national levels, the Section believes that the proposed decentralization could harm irreparably the high standards of EU competition law enforcement.<sup>29</sup> In addition to advocating the allocation of

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<sup>28</sup> See *e.g.*, Press Release No 36/99 of the Court of Justice providing for possible solutions to accommodate the anticipated caseload increase brought on by EU enlargement. Of course, the proposed mechanisms and procedures advocated herein will help to minimize these burdens. However, these mechanisms and procedures are only likely to bear fruit in the longer term. Thus, the Section believes that even with their adoption, these institutions' resources are likely to be strained in the initial phase of any decentralization program.

<sup>29</sup> It should be noted that the U.S. federal government successfully initiated a state competition law enforcement modernization program in 1976, which *inter alia*, established a two-year program to fund state antitrust

such resources, the Section strongly supports the adoption of a phased-in transition to full scale decentralization to ensure further the likelihood of effective decentralized EU competition law enforcement. Such a transitional approach can be executed in a number of ways. For example, assuming that decentralization is accepted, the Member States could be provided with EU competition enforcement powers in one substantive area at a time, *e.g.*, starting with vertical restraints (once the reforms and constituent guidelines are adopted). Once the Member State competition authorities and courts, as well as the Commission, have garnered the requisite concurrent enforcement experience and adopted the necessary procedures and mechanisms related to such enforcement, decentralized enforcement could be adopted in relation to horizontal cooperation agreements (after the Commission=s legislative reforms are adopted in this area). A transition structured in this manner complements the Commission=s legislative activities vis-à-vis substantive competition law rules and analysis, and provides the Member State enforcers with the benefits of the anticipated simplified legislation (which aims to define more precisely the scope of application of Articles 81(1) and (3)),<sup>30</sup> while minimizing the potential negative impact of wholesale, immediate decentralized competition law enforcement. In any event, virtually any phased-in transition to decentralization is likely to prove advantageous.

### **C. Additional Procedural Concerns About Intensified *Ex Post* Control and Information Sharing**

The White Paper proposes a number of procedural reforms to assist the Commission in guaranteeing that the EU competition rules are respected.<sup>31</sup> As discussed below, the Section=s concerns in relation to the proposed procedural reforms pertain to effects of decentralization on information exchanges between the Commission, the national authorities and third-countries and the safeguards necessary to ensure that the fundamental rights of defendant companies and potential deponents are respected under the proposed decentralization. We also note that a number of the procedural proposals advocated in the White Paper, including the possibility for the Commission to hold members of an association jointly and severally liable for fines imposed on the association, may actually serve to eliminate legitimate pro-competitive institutions or functions and that the Commission would be well advised to discuss the anticipated effects of such proposals with European business leaders prior to their adoption.

The White Paper proposes a number of procedures to further strengthen the Commission=s powers of inquiry. These include permitting the Commission to ask a firm=s representatives or staff, during an investigation, any questions that are justified by and related to the purpose of the investigation, and to demand a full and precise answer<sup>32</sup> and to Asummon to its own premises any person likely to be able to provide information that might be helpful to its enquiries, and to take minuted statements.<sup>33</sup>

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enforcement, providing funding and training to individual states wishing to modernize their competition statutes and enforcement.

<sup>30</sup> See White Paper at para. 71.

<sup>31</sup> See White Paper at Chapter III.

<sup>32</sup> *Id.* at para. 113.

<sup>33</sup> *Id.* at para. 114.

The Section recognizes that, to date, the Commission has not enjoyed investigatory powers comparable to those of most EU Member States or the United States= competition authorities (*e.g.*, powers of search and seizure) and that this has proved burdensome to the Commission when trying to secure evidence. However, the Section believes that the powers proposed raise fundamental issues of procedural rights of defendant companies and the individuals to be deposed.

This is particularly the case, in light of the White Paper=s proposed extension of the use of information collected by and on behalf of the EU authorities as part of EU competition investigations. Without further explanation, the White Paper suggests that the national authorities be permitted to use this information in national proceedings, thereby extending the use limitations currently in force, which restrict the use of this information to the EU competition investigation.<sup>34</sup> In this manner, information collected by the Commission potentially could be used in criminal proceedings in the Member States or possibly even in third-countries such as the United States. However, because the Commission=s investigation and sanctioning powers are not considered criminal in nature, defendants and potential deponents to Commission proceedings are not afforded the procedural safeguards considered appropriate to criminal investigations, including the right to effective representation and the right against self-incrimination. Clearly this is an issue that should be addressed and corrected. To this end, the Section proposes that procedural safeguards be adopted to ensure that information obtained by the Commission is used in a manner consistent with rights of defense of companies and the deponents, such that it can be used in subsequent national proceedings, even if criminal in nature. Alternatively, absent adequate safeguards, such information should not be used in criminal proceedings. Such safeguards should be adopted and functioning before the extension of any Commission investigatory powers and before the adoption of any policy to devolve enforcement of Article 81(3) to the national authorities.

Moreover, the Section requests that the Commission ensure that the Member States= authorities not provide unduly easy access to any information collected as part of the EU enforcement process of either the Commission or the Member States (*e.g.*, to the authorities of third-countries or to third-parties). This concern arises due in part to differences in national rules regarding confidentiality of communications, *e.g.*, different approaches to accepting the confidentiality of communications prepared by in-house attorneys or counsel from third-countries.

Thus, the Section advocates that in relation to the enforcement of EU competition law, or use of information obtained in pursuit thereof, the Member States= authorities be made subject to obligations regarding confidentiality and professional secrecy which are at least as stringent as those to which the Commission is held. This would permit parties cooperating with the Commission or the Member States as part of the enforcement of EU competition law minimal assurances that information shared will enjoy certain protections in relation to third-countries and third-parties. Not only will such protections help to secure the continued success of recent Commission initiatives such as the Aleniency program= but also, such safeguards will help to limit criticism of the EU=s information exchange programs with

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<sup>34</sup> *Id.* at para. 97 (information acquired can only be used for the purpose for which it was originally collected and for the application of Articles 81 and 82 or of national competition law as the case may be.)

third countries. The Section underscores that these issues of information exchange and safeguarding confidential communications must be addressed and corrected prior to the entry into force of any decentralization program.

#### **IV. Conclusions**

The Section commends the Commission for its far-reaching proposal to render Article 81(3) directly applicable. The Commission has once again proved its ability to institute important policy initiatives in order to achieve its commitment to ensuring undistorted competition in the EU.

The foregoing comments are based upon our experience in the U.S. context, and are intended to support and strengthen the White Paper=s proposals in accordance with the specific needs of the EU. As noted above, our concerns focus on issues raised by the decentralization of EU competition law enforcement, including the opportunities for forum shopping, conflicting decisions and non-uniform application of EU competition law, and the need for resources both at national and Community levels, as well as procedural issues related to both confidentiality and the exchange of information among the Commission, Member States and foreign governments.

The Section has proposed procedural and systemic changes generally aimed at promoting harmonization among the differing national enforcers. These proposals include adopting a European coordinating association, increasing opportunities for the Commission to play a centralizing role by enforcing the European-wide effect of national decisions, harmonizing procedures and remedies available at the Member State level, particularly in relation to the Member State judiciaries, and reforming the EU system for preliminary rulings. We recognize that there are a number of alternative approaches that the EU may well choose to successfully address these concerns. However, we believe that if these issues are left unattended, they may undermine the reform initiative and burden companies with increased transaction costs as they struggle to clarify their rights and duties to the EU. Recognizing the importance of these issues to the success of the White Paper=s reform program, the Section highlights the need for the allocation of the necessary resources to permit prospective enforcers and courts at both the EU and national levels to meet the demands of EU competition law enforcement. We also suggest that the Commission implement any such reform in a phased-in manner to ensure that national courts and authorities in addition to Community institutions are fully equipped to carry out their new responsibilities proposed in the White Paper.

Thanking the Commission for the opportunity to participate in this process, we would be pleased to answer any questions regarding our comments herein, or to provide any additional information necessary.