

**DRAFT COMMISSION COMMUNICATION ON THE APPLICATION OF
EC COMPETITION RULES TO VERTICAL RESTRAINTS**

PRELIMINARY UNICE COMMENTS

1. These preliminary comments are intended briefly to outline the initial reaction of UNICE's Task Force on "Vertical Restraints" to the draft Commission Communication on vertical restraints, especially in the light of UNICE's exchange of views with DG IV officials. This paper supplements the "preliminary points for discussion" which UNICE has already handed over informally to the Commission. It is UNICE's intention to present more detailed views in the near future.
2. UNICE wishes to stress once again that, in general terms, it supports the Commission's intention to revise its whole philosophy in this area. UNICE particularly welcomes the Commission's efforts towards developing a more economic approach in its assessment of vertical restraints, as well as significantly less severe treatment of these agreements.

UNICE has particularly appreciated being given the opportunity to exchange views with the Commission on this important policy review. It is UNICE's considered opinion that the Commission's new philosophy needs to be further developed towards its logical conclusions, and it hopes that close consultation and cooperation between Commission officials and the business community will continue to take place as the new policy in this area takes a more definite shape.

3. Despite its general support for the Commission's initiative, UNICE still has reservations regarding introduction of one or more market share caps. The most important reasons for these reservations are set out in detail in UNICE's position paper (dated 26 September 1997) in response to the Commission's Green Paper and reiterated in the "preliminary points for discussion" submitted informally to Commission officials on 29 May 1998. Nevertheless, UNICE is presently inclined to look constructively at whether, and under what conditions, a new regime based on one or more market share cap(s) would be capable of meeting the main concerns of industry, which relate to (i) the scope of the new block exemption, (ii) the coverage of the block exemption in terms of percentage of market share, and (iii) the nature of the "flanking measures".
4. As to the question of the market share(s) up to which agreements will be exempted automatically, UNICE is presently considering whether it would be able to lend its support to the concept of a single market share threshold.

UNICE understands that the Commission is considering a new proposal with a single market share threshold that could be considerably lower than the upper threshold of 40% discussed so far

in the context of a double-threshold regime. In this respect, it appears fairly clear already that such a proposal would be met with considerable scepticism by the business community. UNICE believes that, under these conditions, the negative impact of a regime based on market share thresholds would be even harsher.

In addition, UNICE considers that such a regime would not reflect the economic nature of vertical “restraints” and would be likely to run counter to the Commission’s objective of reducing the number of notifications.

5. As regards flanking measures, UNICE remains unconvinced that the proposed amendment of Article 4 (2) of Regulation 17 will be sufficient to remove the inherent negative consequences of introducing market share caps. Amending this article alone will not, in UNICE’s view, be sufficient to dispel industry’s concerns. The same observation would apply to the suggested provisions regarding (temporary) fluctuations in market shares (5%, two years, grace period of one year): while these provisions are welcome, it is doubtful that they will suffice to remove the fear of legal uncertainty.

Finally, UNICE would add that it is dubious whether the proposed amendment of Article 4(2) of Regulation 17 will bring about the desired result. It seems at least probable that, if there is no reasonably rapid way of obtaining reliable confirmation from the Commission, companies would not rely on the possibility of a retroactive exemption and would consequently opt for “normal” notifications.

6. UNICE is hesitant regarding the suggestion to grant national competition authorities the power to withdraw the benefit of the group exemption, in particular where arrangements with cross-border effects are concerned. In any event, should such a possibility be opened, special attention must be given to the consequences of such a withdrawal and to the conditions thereof.
7. UNICE is of the opinion that the content of the guidelines is an important element to be taken into account when evaluating the direction the Commission’s policy is taking. It will give particular attention to the legal status of the guidelines and whether or not they are binding, in particular on national competition authorities and national courts.
8. UNICE begs to disagree with the remark on page 24 of the draft communication that the need for severability is largely removed. In particular in view of the increased uncertainty the introduction of (a) market share cap(s) would bring about, the inclusion of a clause that is not exemptable should not result in the entire agreement being considered void under Article 85 (2) of the EC Treaty.
9. As mentioned above, UNICE will, in due time, provide the Commission with more detailed comments on this matter.
