

**Commission follow-up paper on “Vertical
Restraints”**

UNICE COMMENTS

1. GENERAL REMARKS

1.1 These comments are intended to outline UNICE's position regarding the Commission's initiative to review its policy towards vertical restraints. This paper takes into account the exchange of views with DG IV officials and supplements UNICE's position paper of 26 September 1997 on the Commission Green Paper, its preliminary points for discussion communicated to DG IV officials on 29 May 1998 and its preliminary comments of 14 July 1998 on the draft Commission Communication. UNICE stresses that its earlier observations remain entirely valid. It intends to provide the Commission with additional comments in the near future, in particular following publication of the draft guidelines.

1.2 Generally speaking, UNICE welcomes the Commission's efforts to develop a more economic approach in its assessment of vertical restraints. UNICE particularly appreciates being given the opportunity to exchange views with the Commission and hopes that close consultation and cooperation between Commission officials and UNICE on this important subject will continue to take place in the upcoming period.

1.3 Despite its general support for the Commission's initiative, UNICE still has some reservations regarding several important elements of the new regulatory framework now that it appears to be taking a more definitive shape. These reservations about suggestions for further development of specific points of the suggested Commission policy are set out below.

2. SPECIFIC COMMENTS

2.1 Market share threshold

On various occasions UNICE has communicated its concerns regarding introduction of one or more thresholds in a future block exemption on vertical restraints. Its concerns relate primarily to the fact that markets are difficult to define with any precision, and to the certainty which the parties to vertical agreements require as to the enforceability of their contractual arrangements.

Whereas market dimensions, both as to relevant products as well as to territories, continuously change as a consequence of technological developments and economic integration, and market shares fluctuate accordingly, the introduction of a market share percentage above which the benefit of the block exemption would not be available is, in UNICE's view, highly undesirable because of the direct civil law consequences thereof. It might be added that the introduction of such a market share cap creates many additional complications and uncertainties where agreements cover several products and are concluded for a longer period.

Despite its general scepticism towards the principle of market share caps, UNICE favours the introduction of one single cap as opposed to two, if this is inevitable. Furthermore, it firmly believes that such a single cap should then be set at 40%. This figure provides a safe harbour for a sufficiently large number of contracts, thus reducing not only the legal uncertainties the market share cap itself creates, but also reducing the workload for both the business community and the Commission.

A 40% cap also better reflects the economic analysis that vertical restraints tend to have pro-competitive effects. With a view to minimising the risk of non-enforceability of contracts, the proposed new system would in addition only meet the needs of the business community if it were accompanied by additional safeguards. In this respect UNICE submits the following:

Although the proposed amendment to article 4 para 2 of Regulation No. 17 is in itself a step in the right direction for resolving the problems related to the uncertainty brought about by the introduction of a market share cap, UNICE firmly believes that – in order to make the system work – the new procedural framework should place a clear obligation on the Commission to decide within a reasonable period after notification whether the agreement concerned benefits from the block exemption and, if not, whether or not to exempt it individually.

This obligation should particularly apply in cases where the enforceability of an agreement is or is likely to be disputed in a national court in view of its compatibility or otherwise with European competition rules.

The guidelines should contain additional, clear rules as to how to calculate market shares. These guidelines should provide considerably more guidance than the Commission's Notice on the definition of the relevant market (OJ, 1997 C 372/5) since they will be applied not only by the competition authorities and the business community, but also by national courts which have little or no experience in this field.

The guidelines should, for example, preferably also indicate in which circumstances market shares should in the Commission's view be calculated in terms of value or volume, and which market share (supplier's *vs* purchaser's) is to be taken into account. In addition, the guidelines should also specifically address the significance of competitors' market shares and contain provisions for assessing the market share of innovative products.

2.2 Black clauses

UNICE believes that the proposed list of hardcore restrictions should be considerably shortened.

It suggests deletion from this list of the clauses mentioned under points 4, 5 and 6, if only for the reason that there is no economic justification for blacklisting these (combinations of) clauses, irrespective of market circumstances. In addition it appears that the restrictions mentioned under points 1 and 2 could be limited to one clause prohibiting *de facto* minimum resale price fixing.

Regarding clause 3, UNICE believes that absolute territorial protection may be justified for a certain period and admissible if the restriction relates to the introduction of new products or distribution concepts. The clause should also allow companies to appoint exclusive distributors for specific channels, for example for the professional market *vs* the consumer market.

Finally, UNICE strongly believes that the clause under point 7 should not be part of the blacklist.

Indeed, aftermarket restrictions as covered by clause 7 may only be objectionable in the event that at least the supplier has market power. There is, consequently, no reason why this type of restriction should generally be blacklisted. In addition, UNICE is convinced that blacklisting this clause would create a serious obstacle to outsourcing manufacture of components and product types based on specifications provided by the buyer as such agreements often provide that such specified components or products are to be supplied exclusively to that supplier during a certain lead time. Finally, UNICE feels that the case law of the Community courts does not justify a general blacklisting of this type of clause.

2.3 Competing undertakings

The block exemption is intended to apply to agreements between two or more undertakings operating at different levels in the production or distribution chain. However, the scope of the proposed block exemption is considerably limited by article 1 para 4 that prohibits certain vertical agreements between

(potential) competitors. UNICE suggests removal of at least the notion “potential” and the turnover limit.

If certain agreements between competitors are to be excluded at all from the scope of the block exemption, it should at the very least be possible to conclude non-reciprocal (exclusive) supply arrangements with competitors in relation to intermediate or end products that are not produced by themselves. The present wording of the proposed text does not clearly allow a block exemption in these cases. Rather, it potentially excludes a large number of such supply arrangements from the scope of the block exemption. The inclusion of the word “potential” would make the block exemption almost impossible to apply in practice. Moreover, in particular if a market share cap is introduced, there is no need to include yet another limitation which restricts the benefit of the block exemption to small buyers (or suppliers).

2.4 Withdrawal by Member States’ authorities

UNICE is of the opinion that the withdrawal powers of Member States’ authorities should, if granted at all, only be available in cases where the territory of the Member State in question or a part thereof has all the characteristics of a distinct market. In that case, the guidelines should at least give the authorities sufficient guidance in this respect, also where authorities of other Member States may be involved. In addition, there should be sufficient procedural safeguards for the parties concerned, including adequate possibilities for appeal.

2.5 Easy review by Community Courts

UNICE is of the opinion that direct appeal to the Community Courts against the decisions of national authorities concerning the applicability of the block exemption regulation, or the withdrawal thereof, should be possible in addition to national remedies. Only in this way will the necessary consistency in application of European competition rules be most effectively safeguarded.
