

**DRAFT COMMISSION REGULATION
ON THE APPLICATION OF ARTICLE 81 (3) TO CATEGORIES OF
VERTICAL AGREEMENTS AND CONCERTED PRACTICES**

UNICE COMMENTS

1. GENERAL REMARKS

- 1.1 These comments are intended to outline UNICE's position regarding the Commission's draft Regulation (EC) on the application of Article 81 (3) of the Treaty to categories of vertical agreements and concerted practices.
- 1.2 This paper supplements UNICE's position papers of 26 September 1997 and 8 March 1999 on the Commission Green Paper and Follow-Up Paper on "Vertical Restraints", and 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 on the draft guidelines.
- 1.3 As stated in these earlier documents, generally speaking, UNICE welcomes the Commission's efforts to develop a more economic approach in its assessment of vertical restraints. UNICE appreciates being given again 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.
- 1.4 Despite its general support for the Commission's initiative, UNICE has reservations regarding several important elements of the draft regulation. These reservations and suggestions for further development of specific points of the suggested Commission regulation are set out below.

2. SPECIFIC COMMENTS

2.1 *Market share threshold*

UNICE has consistently communicated its firm belief that vertical restraints tend to have pro-competitive effects and are only likely to have adverse effects on competition in a situation where there is a dominant position of the supplier (or buyer) in question. As there generally is not a serious risk that dominance might exist if a supplier has a market share of 30%, we therefore believe that a single cap should be set higher at around 40%.

2.2 *Black clauses and Severability*

As stated previously, UNICE believes that the proposed list of hardcore restrictions should be considerably shortened to those restrictions that amount to price fixing and absolute territorial protection. We believe that there is no economic justification for blacklisting other clauses, irrespective of market circumstances.

Similarly, UNICE considers that the rule of severability should not only apply to the non exemptable obligations set out in Article 4 of the draft Block Exemption Regulation but that there should also be severability for hardcore restrictions. Thus, the benefit of the block exemption should not be in jeopardy for the entire vertical agreement if a dispute might arise whether a hardcore situation is actually present or not.

2.3 *Competing undertakings*

The block exemption is intended to apply to agreements between two or more undertakings operating, for the purpose of the agreement, 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 competing undertakings.

In Article 11 of the draft regulation, ‘competing undertakings’ is defined as actual or potential suppliers of contract goods or services which are regarded as interchangeable or substitutable by the consumer. UNICE suggests removal of the notion “potential”. Inclusion of the word “potential” would make the block exemption almost impossible to apply in practice. In case the notion “potential” is not removed, it should be clarified (possibly in the guidelines) that classical industrial outsourcing is covered by the block exemption. Moreover, it should be clarified that the supply of the contract goods by a potential competitor is exempted if it is practically or technically, as well as economically, not feasible for the buyer to produce the contract goods by himself within a very short period of time.

Moreover, UNICE considers that the turnover limit of Article 1(4) (a) should be considerably increased, taking into account at least inflation since adoption of the previous block exemption regulation.

2.4 *Withdrawal of the benefit of the block exemption*

UNICE is of the opinion that the withdrawal powers of the Commission and Member States’ authorities should not be available in cases where there is a cumulative effect of parallel networks of similar selective distribution agreements and the distributors concerned are not prevented from choosing which other similar products from other suppliers they want to distribute. In a situation where a large majority of suppliers selectively distribute their products but where these distributors are free to distribute other similar products from other suppliers, there is no real danger that markets are foreclosed.

As regards the withdrawal powers of Member States’ national authorities, UNICE is very concerned that the regulation does not provide for sufficient safeguards to preserve a coherent application of European competition law. Similar agreements could be treated differently depending on each Member States’ practice, thus detracting from the uniform application of Community law. To ensure coherence and consistency, national authorities should be required to consult the Commission and each other if they intend to withdraw the benefit of the block exemption. Member States should give sufficient advance publicity to such a decision and efficient European appeal mechanisms should be available.

As regards the power of the Commission to declare by regulation that the block exemption shall not apply to certain vertical agreements relating to a certain market, UNICE believes that such a regulation is solely appropriate if the agreements at stake have certain effects which are incompatible with the conditions laid down in Article 81 (3) and in particular where access to the relevant market or competition therein is significantly restricted. UNICE would therefore like to see the conditions of Article 5 and 6 included in Article 7, especially since it is not at all clear where the distinction lies between a withdrawal relating to a plurality of particular cases and a withdrawal relating to a particular market.

Furthermore, UNICE considers the transition period of six months provided for in the draft regulation, insufficient and would like to urge the Commission to adopt an appropriate transition period of two years considering that certain agreements are concluded for long periods and that it is practically impossible to change a Europe-wide distribution network in a short period of time.

2.5 Non-compete obligations

UNICE is of the opinion that the application of a non-compete obligation that exceeds 5 years is justified when there are specific investments to be made and the investment is sunk and brand-specific, long-term and not recouped in the short run, and, lastly, asymmetric. Although the Commission makes the same point in 108 para 5 of the guidelines, UNICE would like to see it expressly stated in Article 4 of the Regulation that the block exemption does apply in these situations.

2.6 Transition period

UNICE strongly believes that the transition period of 18 months as provided for in Article 12 is insufficient to counterbalance the loss of legal certainty for the companies involved whose agreements are no longer exempted as a result of the repeal of existing block exemption regulations. UNICE would therefore urge the Commission to consider a more suitable period of at least two years or follow the solution as adopted in Regulation 240/96, that existing agreements that comply with present block exemption regulations, will remain exempted for the duration of these contracts.
