UNICE
Union of Industrial and Employers' Confederations of Europe
Union des Confédérations de l'Industrie et des Employeurs d'Europe

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DRAFT COMMISSION GUIDELINES ON VERTICAL RESTRAINTS

UNICE COMMENTS

1. INTRODUCTION

1.1 On 22 October 1999, UNICE issued its comments on the draft Commission Regulation on the application of Article 81 (3) to categories of vertical agreements and concerted practices. The present comments are intended to outline UNICE's position regarding the draft guidelines that accompany the draft Regulation. This paper supplements UNICE's earlier position paper.

1.2 As stated in that document, generally speaking, UNICE welcomes the Commission's efforts to develop a more economic approach in its assessment of vertical restraints and hopes that close consultation and cooperation between Commission officials and UNICE on this subject will continue to take place.

1.3 In addition, UNICE welcomes the adoption of guidelines that accompany the block exemption regulation and that are aimed at helping companies to assess their vertical agreements under the EC competition rules. However, UNICE regrets to note that in some respects the draft guidelines do not succeed in achieving that aim and fail adequately to address some important distribution concepts.

1.4 UNICE therefore has reservations regarding several elements of the draft guidelines. These reservations and suggestions for further development of specific points of the proposed guidelines are set out below.

2. GENERAL REMARKS

2.1 *Structure and wording*

UNICE would like to request the Commission to avoid as much as possible the use of unclear words and ambiguous terms such as "competition concerns", "insufficient", "appreciably" and "significant" or "substantial". UNICE realises that these terms are often used by the relevant Community and national institutions but would nevertheless like to make the point that in the context of guidelines aimed at helping companies to assess their agreements, such wording without proper definitions increases uncertainty.

Similarly, UNICE believes that the practical assistance the guidelines could provide would benefit from more consistent use of the distinction between para 1 and para 3 of Article 81. In some instances (*e.g.* at section 1.3 and 2 of chapter VI), the draft guidelines fail to make sufficiently

clear whether the competition concerns about a certain agreement relate to the fact that the agreement is not exemptable in accordance with para 3 of Article 81, or whether they relate to the fact that they are considered to give rise to appreciable anti-competitive effects as covered by Article 81 (1). UNICE would like to urge the Commission to make it consistently clear when the applicability of Article 81 (1) is at stake or when an agreement cannot be exempt under para 3 of that provision.

UNICE welcomes the inclusion of examples in the guidelines. However, UNICE believes that guidance as to the balancing of pro- and anti-competitive effects of specific vertical restraints would increase if the relevance of the different variables were further clarified.

2.2 *Review*

UNICE would like to suggest that the Commission carries out a review of the guidelines after they have been in force for a period of two years. Such a review should take into account the practical application of the guidelines by companies and also their economic effects, which UNICE feels should be further evaluated in order to continue the work towards a more economic approach in assessing vertical restraints.

3. SPECIFIC COMMENTS

3.1 *Agency Agreements*

UNICE is surprised that the Commission intends to include a section on agency agreements in the framework of guidelines to the block exemption regulation for vertical restraints. UNICE would prefer the Commission to undertake guidance on agency agreements in a separate Notice after wide consultation on the topic, allowing interested parties the time necessary to comment on this important issue.

Having said this, UNICE believes that the Commission in the draft guidelines fails adequately to come to grips with the commercial reality of agency agreements.

The Commission states that the determinative factor in assessing whether Article 81 (1) is applicable is the financial and commercial risk borne by the agent in relation to the contracts concluded under the agency agreement. Agency agreements are covered by the block exemption regulation, and thus its list of hard-core restrictions, as soon as the agent bears a financial and commercial risk such as set out in para 17 of the draft guidelines.

UNICE notes that where the 1962 Notice on exclusive dealing contracts with commercial agents refers to a substantial financial risk, the agent now is not allowed to take any financial and commercial risk. UNICE would like to stress that it is inherent in agency agreements that the agent provides for sufficient safeguards that he is capable of performing his task. The agent naturally takes the risk of concluding the agency agreement itself. If the agent cannot find any customers and sell the principal's goods, he will not receive his commission. It is inherent in agency agreements that the agent provides for agency services and invests in an organisation, a building, a distribution network and hence some other assets to enable him to promote the goods of any principal. It is inherent in agency agreements that the agent provides for some kind of security; responsibility towards his customers for harm caused by the product sold can even be regarded as essential considering the terms of Directive 85/374/EEC on liability for defective products.

UNICE considers it unacceptable that the Commission proposes that such normal agency agreements should now fall within the scope of Article 81 (1). Obligations that form an inherent part of an agency agreement because they relate to the ability of the principal to determine the scope of the agent's activity, would risk being declared void and in some cases would not even be exempt because they are blacklisted in the block exemption regulation.

It is inherent in the very nature of an agency agreement that non-compete clauses are included, that exclusivity is negotiated and that the principal determines the terms of the contract as regards to whom he will sell and at what price. Of course the agent can rebate part of its own commission to the purchaser but it would be contrary to any commercial reality for the agent simply to be able to set the price which the principal will receive. For this reason, UNICE does not agree either with the Commission's statement at para 20 that exclusive agency provisions and non-competition provisions fall within Article 81 (1) if they lead to foreclosure on the market for agency services. Such provisions are inherent in agency agreements and should therefore not fall within Article 81 (1). In addition the market for agency services is too narrow considering that the relevant market for distribution of the goods concerned can be significantly larger.

UNICE would therefore strongly urge the Commission to adopt a wider definition of the risk that commercial agents could accept without falling within the scope of Article 81 (1), and to delete para 20. Alternatively, UNICE suggests that the Commission at least clarifies that all activities mentioned in para 17 should be carried out to a significant extent and specifically relate to the contract goods that are the object of the specific contracts concluded by the agent, and that the foreclosed market mentioned in para 20 is the relevant market instead of the market for agency services.

Lastly, UNICE considers the reference to the legal property of the goods in the second sentence of para 17, confusing and therefore suggests the Commission deletes this. If the agent acts as an intermediate for the principal he could become the legal owner of the goods for an infinitesimal period of time without having the economic interest in the contract goods. It is the economic interest in the contract goods that should be taken into account.

3.2 *Competing undertakings*

As stated in its earlier comments on the draft block exemption regulation, UNICE considers that vertical agreements between potential competitors should not be prohibited. Inclusion of the word "potential" in the definition of 'competing undertakings' set out in Article 11 of the draft regulation would make the block exemption almost impossible to apply in practice. In UNICE's view the Commission should therefore clarify in the guidelines that classical industrial outsourcing is covered by the block exemption and that the potential supply of the contract goods in question by the other undertaking should not be merely theoretical but also practically and economically feasible within a very short period of time.

3.3 *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. UNICE believes 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 hard-core restrictions. Thus, the benefit of the block exemption

should not be in jeopardy for the entire vertical agreement if a dispute were to arise as to whether there is actually a hard-core situation.

3.4 *Positive effects of vertical restraints*

As stated in its previous comments, 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 welcome further clarification as regards the length of time it could take to depreciate the investment and as regards the nature of the investment concerned.

3.5 *Franchising*

Regarding the Commission's statement at para 199.2 that non-compete obligations on the goods or services purchased by the franchisee are only valid when the obligation is necessary to maintain the common identity and reputation of the franchised network and the franchiser does not have a dominant position, UNICE believes that this is too narrow. Non-compete obligations should also be permissible when they are necessary to protect investments made.

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