



**DRAFT COMMISSION NOTICES CONCERNING THE
APPLICATION OF THE EC MERGER REGULATION**

UNICE COMMENTS

1. INTRODUCTION

UNICE has noted the Commission's draft Notices dealing with the treatment of ancillary restraints, commitments and routine cases under the Merger Regulation and welcomes the opportunity to exchange views with the Commission on this initiative.

In general UNICE welcomes the adoption of Notices by the Commission insofar as these documents provide guidance as to the manner in which the Commission will treat cases under EC competition law and give additional certainty to companies. However, UNICE regrets to note that in some respects the proposed Notices intensify demands on business and increase uncertainty for companies.

UNICE is resolutely in favour of developing and sustaining a competitive commercial environment in the European Union and it is convinced that competition provides the best incentive for business efficiency, encourages innovation and guarantees consumers the best choice. UNICE has always been in favour of a more economic approach for assessing anti-competitive effects of business behaviour rather than a strict legalistic interpretation and a clause-based approach that would unnecessarily worsen constraints on undertakings and the Commission. UNICE has therefore welcomed recent Commission efforts to develop a more economic approach in its assessment of vertical restraints and to refocus the scope of Article 81.

2. DRAFT NOTICE ON RESTRICTIONS DIRECTLY RELATED AND NECESSARY TO CONCENTRATIONS

According to the Commission the current 1990 Notice on ancillary restraints should be updated to reflect the Commission's current practice in this field. The accompanying Memorandum sets out preliminary conclusions based on the Commission's experience under the existing Notice. UNICE wonders whether the Memorandum is intended to be part of the Notice and has thus been similarly drafted to provide guidance as to the manner in which the Commission will treat ancillary restraints under the Merger Regulation, or whether the Memorandum is simply an introduction to the draft of the new Notice.

As a general point and as stated above, UNICE has always advocated a more economic approach whereby the economic effects of the arrangements as a whole are considered instead of a focus on the legal clauses contained in agreements. Although the Commission states in its Notice that the evaluation as to whether the clauses concerned have any appreciable restrictive effect within

the meaning of Article 81 (1) falls outside the scope of the assessment of ancillary restraints under the

Merger Regulation, UNICE would like to urge the Commission not to consider and approve individual clauses from a strictly legalistic point of view to the detriment of an effective assessment of whether clauses or agreements are in fact anti-competitive.

UNICE considers that it should be acknowledged in the Notice that the parties themselves are usually in a good position to determine whether a clause is directly related and necessary to a concentration and that therefore their position as to the ancillary nature of clauses is the starting point for the evaluation carried out by the Commission.

Although the Commission states at para 32 of the Memorandum that it will not consider non-binding agreements or simple declarations of intentions as eligible for scrutiny as ancillary restraints, UNICE would like to urge the Commission to consider texts set out by way of a letter of intent or draft. In practice agreements which would meet the test for mandatory notification are often completed before the precise detail of the ancillary documentation has been worked out. Appropriate safeguards could be introduced in order to prevent approval of an ancillary restraint from covering an eventually binding agreement that exceeds the scope of the approval.

UNICE notes that the Commission proposes to remove its statement in paragraph 2 of the present Notice, that the Commission endeavours, within the limits set by the Regulation, to take the greatest account of business practice and of the conditions necessary for the implementation of concentrations. UNICE wonders whether this indicates a shift in the Commission's approach to concentrations, which UNICE would strongly disapprove of. It is UNICE's firm belief that practical business considerations should be taken into account when a concentration is assessed.

1 Non-competition clauses

At para 13, the Commission proposes to reduce the acceptable duration of a prohibition on competition from five to three years where goodwill and know-how are transferred. UNICE is surprised that the Commission does not give any explanation for this reduction. UNICE considers that non-compete obligations when elements of goodwill and know-how are transferred should continue to be acceptable for a period up to five years, as is the case in the proposed scheme for vertical restraints. There is no reason to depart from this policy in the new Notice. Moreover, the proposed reduction is not in line with the decision of the European Court of Justice in Case 42/84, *Remia BV v. Commission*. The same comments apply to para 39, where the duration of non-competition clauses in cases involving joint ventures is concerned.

Furthermore, the non-competition clause on the buyer and/or vendor regarding the transferred activities should, for the allowable period, also be permitted regarding acquisitions by subsequent acquirers of the activities of the first acquirer and vendor.

As regards para 14, where the Commission states that the non-competition clause must be limited to the area where the vendor offered the relevant products or services before the transfer, UNICE strongly believes that this is too narrow. It is appropriate that a purchaser of a business can also be protected from competition in respect of geographic markets in which the vendor has a reputation and/or is a viable potential competitor.

As regards para 15, where it is stated that non-competition clauses must be limited to products and services which form the economic activity of the undertaking transferred, UNICE is of the view

that non-competition clauses should also be allowed to cover improved versions or updates of the products that form the economic activity, as well as successor models of these products.

Similarly, UNICE believes that it should be acceptable that the buyer is prevented from competing with enterprises that are retained by the vendor in order to avoid the inadvertent acquisition by the buyer of a broader business and goodwill. UNICE suggests that the Commission mentions this specifically in the Notice.

2 Purchase and supply obligations

In general, UNICE would like to repeat concerns that the Commission should not consider and approve individual clauses from a strictly legalistic point of view but should focus on actual economic effects. In this context UNICE is particularly concerned about the Commission's explicit opposition to exclusive purchase or supply obligations (at para 27).

Moreover, UNICE considers inappropriate to the goods in question the proposal for a starting presumption of three years for determining what constitutes a necessary duration of purchase and supply obligations in relation to complex industrial products. It regards it also as contrary to the arguments the Commission itself develops that it is impossible to have a general presumption. UNICE therefore proposes removal of this presumption.

3 Evaluation of common clauses in the case of joint ventures

At para 40 the Commission proposes that prohibitions on competition between parent undertakings and a joint venture which extend beyond the life of the joint venture may never be regarded as directly related and necessary to the implementation of the concentration. UNICE is surprised again that the Commission does not explain why it thinks it necessary to change its previous practice, and, moreover, does not agree with the Commission's statement. It can be appropriate to allow non-compete obligations to extend for a few years following withdrawal of a party from the joint venture. The same applies to non-compete obligations between non-controlling parents and a joint venture. In fact, a non-controlling parent can play a significant role in an enterprise, especially when he is involved in management tasks.

At para 43, the Commission proposes that the restrictive effect of confidentiality clauses should not exceed that of non-compete clauses. UNICE is of the view that prohibitions on use of confidential information should be unlimited in duration, subject only to their ceasing to apply after the information has become publicly available without the fault of the party bound by the confidentiality clause. UNICE believes that the Commission's proposal to limit confidentiality clauses in time is contrary to companies' legitimate interest to protect valuable business secrets. The same comments apply to para 17 of the Notice.

3. DRAFT NOTICE ON COMMITMENTS SUBMITTED TO THE COMMISSION

UNICE understands that the purpose of this Notice is to provide guidance on commitments to modify the originally notified concentration in order to reduce the merging parties' market power and restore competition in the market.

UNICE agrees with the Commission that the capacity of a commitment to remedy the competition problem should be considered on a case-by-case basis and that it is difficult to define in advance

what an appropriate remedy would be in each case because market conditions and the parties' situation will vary. Having said this, UNICE welcomes the provision of useful guidance, which can assist companies in preparing proposals for commitments and increases transparency in the Commission's policy towards assessing such commitments.

UNICE would like to make a few observations concerning the draft notice.

At para 7 the Commission states that there are two basic approaches with regard to an adequate solution to the competition problems raised by a given merger. With reference to the first approach of restoring the status quo ante, UNICE would like to request the Commission to elaborate further on the commitment to dispose of market shares added through the proposed concentration.

UNICE assumes that in para 8 (last line), the draft erroneously omits the word "market".

With respect to the timing requirements for submission of commitments in the first and second phase, UNICE would like to express its support for the position regarding the timing of submission of notification in a formal Notice. This will provide clarity and speedy resolution of decisions.

UNICE does not agree with the Commission's statement in para 43 that in most cases it is appropriate to appoint a trustee to effect a divestment. UNICE would therefore like to urge the Commission not to mention this in the Notice.

4. DRAFT NOTICE ON A SIMPLIFIED PROCEDURE

UNICE welcomes the adoption of a simplified procedure for mergers which do not give rise to competition concerns. It is in the interest of the business community that such cases are dealt with as quickly and efficiently as possible. UNICE would like to suggest that the Commission reviews this Notice some time after the proposed system has been in operation with a view to increasing the number of cases which could benefit from the simplified procedure.

Having said this, UNICE is concerned that the possibility for the Commission of reverting to a normal first phase merger procedure in the period up to the one-month deadline, should it consider such action appropriate, could result in a prolongation of the time limit that is imposed on the Commission for adopting a decision under the normal procedure. Companies that initially qualified for the simplified procedure should not be prejudiced as a consequence.

Furthermore, UNICE considers to be unnecessary the requirement imposed on companies to provide also information on all possible alternative relevant product and geographical markets on which the notified concentration could have an impact and to provide data and information relating to the definition of such markets. It also regards it as excessively burdensome for the companies concerned. Demanding such elaborate information in cases that by their nature are not likely to raise competition concerns runs counter to the idea of a simplified and efficient procedure for treating such cases.

As regards ancillary restrictions (para 14), UNICE is of the view that this paragraph requires further clarification. The Commission seems to be reserving the right to verify the direct relationship and necessity criteria for ancillary restraints after the deemed approval of a

concentration. UNICE strongly believes that such uncertainty is harmful for business and should be avoided.
