

**DRAFT COMMISSION GUIDELINES ON VERTICAL RESTRAINTS****SUPPLEMENTARY UNICE COMMENTS****1. INTRODUCTION**

On several occasions UNICE has made its views known on the Commission's evolving new policy regarding vertical agreements. UNICE has some additional comments to make on the draft guidelines that are supposed to accompany the block exemption regulation and would therefore like once again to address the Commission on the topic of vertical restraints. The supplementary observations are based on the text of the draft guidelines that was published in the Official Journal of 24 September 1999.

UNICE would welcome the opportunity to provide the Commission with further remarks as and when it receives a new draft of the guidelines. UNICE would therefore kindly ask the Commission to submit to it a copy of a new draft of the guidelines in order to allow it to comment in good time. UNICE would in particular welcome the opportunity to comment on the revised text of the guidelines which is soon to be (or has recently been) presented to the Member States.

As a preliminary remark, UNICE wishes to stress that, on the whole, it welcomes the Commission's draft guidelines. UNICE is in agreement with the Commission that the draft guidelines may be helpful in enabling companies to assess whether the Commission would consider their agreements to be compatible with Article 81 EC and that they, consequently, may contribute to legal certainty. UNICE would however urge the Commission to take note of the following supplementary observations.

**2. GENERAL REMARKS***Agency Agreements*

As stated before, UNICE considers that the part of the guidelines on agency agreements should be substantially reviewed. Although UNICE agrees with the Commission's statement in paragraph 16, that the financial and commercial risk which is pertinent to the assessment of a particular agency agreement under Article 81 (1) is the risk which is specific and directly related to the contracts concluded by the agent, and that risks related to the activity of providing agency services in general are not material to this assessment, it disagrees strongly with the Commission's remarks in paragraph 17 and 18.

UNICE considers that the Commission's reasoning in relation to the question of risk, as set out in paragraph 17 and 18, does not reflect accurately the relevant case law of the Court of Justice, is not in line with the preceding statement in paragraph 16 and does not reflect properly the economic reality of many agency agreements. In particular, UNICE disagrees that investments that enable the agent just to be active (such as in warehousing, infrastructure and a commercial

network), and that are made independently from the actual supply arrangements negotiated by that agent, could trigger application of Article 81 (1).

UNICE urges the Commission to consider inclusion in the guidelines of a more extensive list of activities involving restrictions and obligations that are inherent to agency agreements and fall outside the scope of Article 81 (1). Similarly, UNICE would welcome more guidance on the reasons why (exclusive) agency agreements might be exempt under Article 81 (3).

#### *Grounds for Exemption*

As stated previously, UNICE believes that the practical assistance the guidelines could provide would benefit from a more detailed discussion of the applicability of Article 81 para 3 to vertical restraints. As regards resale price arrangements and agreements falling in the market partitioning group, the draft guidelines focus in particular on Article 81 para 1 and do not contain detailed observations on the possibility of exemption under Article 81 para 3. In addition, the possible grounds for exemption of restrictive franchising and tying arrangements are merely touched upon in the draft guidelines.

#### *Dominance and Exemption*

In UNICE's view, the Commission's statement in paragraph 128 of the draft guidelines does not reflect correctly either relevant case law of the Court of Justice or the decision practice of the Commission. UNICE believes that the suggestion that vertical agreements entered into by dominant firms are not eligible for exemption is not correct and should be altered. The fact that a company would become dominant because of its market share does not necessarily mean that competition in respect of a substantial part of the products in question would risk being eliminated and that the situation described in Article 81 (3) (b) would thus arise. This would in particular not be the case when there is no foreclosure of markets. The same applies to situations where market shares vary because of the dynamic nature of markets (see below).

#### *Dynamic Markets*

UNICE would suggest the Commission recognises more prominently the dynamic nature of markets and competitive conditions causing market shares to vary. The draft guidelines appear to touch only indirectly on changes in this parameter over time (*e.g.* at para 100, 125 and 188) and primarily concentrate on the *status quo* of markets (*e.g.* para 116).

#### *Non-compete Agreements*

UNICE considers that the draft guidelines are insufficiently clear on the permissibility of a non-compete agreement lasting for longer than five years. The concept of high-sunk or brand-specific investments could be clarified in this context. UNICE would therefore welcome more detailed guidance on the circumstances under which, according to the Commission, non-compete agreements would justify a longer duration than five years.

### 3. THE USE OF INTERNET

Distribution of goods and services through the internet is becoming increasingly important. UNICE notes that the Commission only briefly in the draft guidelines refers to the use of internet to advertise and sell products (at para 42) and understands that the Commission might be reluctant to enter into an extensive analysis on the possible effects on competition of this type of distribution agreements in the framework of the guidelines. Nevertheless, UNICE would welcome a general

acknowledgement in the guidelines that these new methods of distribution may play an increasingly important role in the assessment of vertical agreements, in particular with respect to evaluation of the degree of potential competition, foreclosure of markets and definition of markets. In this context, UNICE would prefer the Commission to give more guidance on the activities mentioned in para 42 of the draft guidelines.

#### 4. BLOCK EXEMPTIONS AND NATIONAL LAWS

The Commission states at para 11 of the draft guidelines that, to the extent that agreements do not fall within the scope of Article 81 (1), the block exemption regulation does not preclude the application of national competition law.

UNICE is concerned that the method of analysing vertical agreements as set out in the guidelines will lead to more agreements falling outside the scope of Article 81 (1). These agreements will consequently not benefit from the block exemption regulation and are thus to be reviewed under national competition law.

In the context of decentralisation, UNICE has warned for fragmentation of the internal market. When a particular agreement is treated differently depending on the climate of enforcement and particular policy priorities within each Member State, there is a danger of re-nationalisation of competition law. Differences in the business environment from one Member State to another might jeopardise the integrity of the internal market.

UNICE firmly believes that it is important that companies are able to assess the validity of their agreements with a satisfactory degree of certainty, not only under European competition law but also under national competition law.

UNICE therefore calls on the Commission to propose measures shielding agreements that fall outside the scope of Article 81 (1) from prohibition further to application of national competition law. The Commission could for instance, in the framework of the *De Minimis* Notice, consider having a negative clearance regulation that would be directly effective in the Member States, or to propose a regulation determining the relationship between national laws and the block exemption regulations pursuant to Article 83 (e).

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