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

6/14/1 **23 May 2000**

DRAFT COMMISSION REGULATIONS ON THE APPLICATION OF ARTICLE 81 (3) EC TO CATEGORIES OF R&D AND SPECIALISATION AGREEMENTS AND DRAFT GUIDELINES ON HORIZONTAL CO-OPERATION

UNICE COMMENTS

1. INTRODUCTION

These comments are intended to outline UNICE's position regarding the Commission's draft Regulation on the application of Article 81 (3) to categories of research and development agreements, the Commission's draft Regulation on the application of Article 81 (3) to categories of specialisation agreements and the draft guidelines on the applicability of Article 81 to horizontal co-operation.

Generally speaking, UNICE welcomes the Commission's efforts to develop a more economic approach in its assessment of horizontal agreements and is pleased that the Commission now proposes to allow companies greater contractual freedom for their co-operation, moving away from a clause-based approach.

Despite its general support for the Commission's initiative, UNICE still has some reservations regarding several important elements of the new regulatory framework. UNICE would also prefer the Commission to regulate not only R&D and specialisation agreements through directly applicable block exemption regulations but also other horizontal co-operation agreements which are now going to be dealt with by non-binding guidelines. UNICE therefore calls on the Commission to seek the necessary powers to adopt block exemption regulations also for other categories of horizontal co-operation agreements than those that are currently proposed. The need for broad block exemption regulations would be particularly urgent if the Commission's proposals on modernisation of competition policy were to be implemented resulting in the establishment of a directly applicable exception system and abolition of the notification system.

UNICE's reservations and suggestions for further development of specific points of the proposed Commission policy are set out below.

2. GENERAL REMARKS

Market share thresholds

On various occasions UNICE has communicated its concerns regarding introduction of market share thresholds in block exemption regulations. Its concerns relate primarily to the fact that markets are difficult to define with any precision, and to the certainty which the parties to 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.

Despite its general scepticism towards the principle of market share caps, UNICE believes that such a cap, both for R&D and specialisation agreements, should then be set at the same level as is currently the case for vertical agreements, *i.e.* at 30%. 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 30% cap also better reflects the economic analysis that R&D and specialisation co-operation agreements between companies that do not have market power tend to have pro-competitive effects. With a view to minimising the risk of non-enforceability of contracts and bearing in mind that, further to the entry into force of proposals to reform Regulation 17, the current notification system is still of relevance to horizontal agreements, the proposed new system for horizontal agreements would only meet the needs of the business community if it were accompanied by additional safeguards. In this respect UNICE submits the following:

- The new procedural framework should, as is currently the case for vertical agreements, provide for the possibility to notify agreements retroactively. Amendment to article 4 para 2 of Regulation No. 17 to that effect would in itself be a step in the right direction for resolving the problems related to the uncertainty brought about by the introduction of a market share cap.
- In order to make the system work, a clear obligation should be imposed on the Commission to decide within a reasonable period after notification of an agreement whether the agreement concerned is to be exempted. 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. Alternatively, the Commission should review its 1997 Notice on the definition of the relevant market.

In addition, UNICE is surprised that the Commission, at para 30 and 90 of the draft guidelines, refers to the Herfindahl-Hirshman Index as an indicator to assess the impact of a co-operation on market competition. The HHI is mainly used in the context of the US system for analysing market structure for the purpose of merger control, rather than assessing market behaviour under European competition rules. UNICE believes that the Commission should not encourage application of this tool in a framework that differs substantially from the one for which it is designed, and points out expressly the limitations of the instrument.

3. DRAFT REGULATIONS ON R&D AND SPECIALISATION AGREEMENTS AND DRAFT GUIDELINES

General comments

As stated previously, UNICE is pleased that the Commission proposes a more economic approach for analysing horizontal co-operation agreements and deletion of the existing list of exempted clauses ("white list"). UNICE expects that the new regulations will indeed be easier to apply and welcomes the increase in contractual freedom for parties to co-operation agreements. UNICE also welcomes the fact that companies are no longer required to draw up a framework programme prior to entering into R&D agreements and that the Commission proposes deletion of the turnover threshold in the regulation on specialisation.

UNICE welcomes the fact that the Commission proposes adoption of guidelines that accompany the block exemption regulations and which are aimed at helping companies to assess their co-operation agreements under the EC competition rules. However, UNICE regrets to note that in some respects the draft guidelines do not succeed in providing the analytical framework as envisaged in para 7 of the draft guidelines. In several sections the draft guidelines are not sufficiently precise to serve as an appropriate basis for analysing whether horizontal agreements fall within the scope of Article 81 (1) or qualify for exemption under para 3 of that Article.

Having said this, UNICE notes that the Commission in section 2.3.1.1 and 3.3.1.1 of the draft guidelines, sets out which agreements do not fall under Article 81 (1). UNICE is concerned that such agreements are subsequently to be reviewed under national competition law leading to differences in the business environment from one Member State to another which might jeopardise the integrity of the internal market. In this context, UNICE 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 in order to avoid fragmentation of the internal market and re-nationalisation of competition law (see further below).

Market share limit and duration

In addition to its above comments on market share thresholds, UNICE firmly believes that application of the block exemption regulation on R&D to agreements that relate to totally new products should not be dependent of application of the normal market share threshold. Due to the specific nature of the products concerned, participating undertakings are bound to have significant market power on the relevant market for these products after the end of the period referred to in Article 3 (1) of the draft regulation.

As a general point, UNICE is worried about the concept of products capable of being improved or replaced by the contract product which is used in the R&D draft as the criterion for assessing whether manufacturers are competitors and whether they have market power. The category of products capable of being improved or replaced is ambiguous and needs further clarification. UNICE suggests that the Commission gives further guidance on this concept in the guidelines.

Lastly, UNICE is of the opinion that the block exemption regulation on R&D should be more flexible as regards duration of exemption when there are specific investments to be made and the investment is long-term and not recouped in the short run. UNICE is concerned that five years from the time the contract products are first put on the market within the common market might be too short a period of time for such substantial investments to be recouped. Without any

certainty as to the enforceability of their contractual arrangements after five years, the parties concerned might refrain from undertaking such investments at the expense of European competitiveness. UNICE believes that the maximum duration for exemption should be at least ten years.

Conditions for exemption

The Commission proposes in Article 2 (3) of the draft regulation on R&D, that the exemption for agreements that provide only for joint research and development shall apply on the condition that each party is free to exploit the results of the joint research and development and any pre-existing know-how necessary therefor independently.

UNICE considers that it should be permissible that exploitation of the results of the joint research and development can be restricted between non-competitors to one or more fields of technical application, as is currently the case under the existing block exemption regulation for R&D (Article 4 (e)).

Additionally, as regards the reference in Article 2 (3) of the R&D draft to any pre-existing know-how necessary for independent exploitation, UNICE believes that it should be permissible to restrict the use of unprotected know-how. Alternatively, it should be clarified that the relevant pre-existing know-how is the know-how that is specifically included in the co-operation agreement concerned.

In Article 2 (4) of the draft regulation on R&D, the Commission proposes that any joint exploitation of the results of the joint research and development must relate to results that are protected by intellectual property rights which substantially contribute to technical or economical progress. It seems that consequently the Commission proposes that joint exploitation which relates to results which constitute know-how are not to be covered by the block exemption, although Article 2 (d) of the existing block exemption regulation for R&D specifically allows joint exploitation which relates to results which constitute know-how. UNICE is of the view that, also under the new regime, companies should be free to jointly exploit results that constitute know-how and which are not protected by intellectual property rights.

Black clauses

The Commission rightfully states in the guidelines that R&D co-operation between non-competitors does generally not restrict competition but that such agreements can produce foreclosure effects under Article 81 (1) if they relate to an exclusive exploitation of results and if they are concluded between firms, one of which has significant market power with respect to key technology (para 53). UNICE therefore believes that the proposed list of hard-core restrictions in the R&D draft should only apply to non-competitors as far as such foreclosure effects are concerned.

Moreover, UNICE believes that the prohibition to make passive sales for the contract products in territories reserved for other parties, should only be blacklisted in the R&D regulation if it is imposed after the end of five years from the time the contract products are first put on the market within the common market. It suggests therefore that the Commission amends the clause mentioned under Article 5 (f) of the R&D draft to that effect. In addition UNICE would welcome further clarification as regards the reason why the clause mentioned under Article 5 (h) is blacklisted, considering that the Commission can withdraw the benefit of the block exemption if without any objectively valid reason the parties do not exploit the results of the joint research and development (Article 7 (c) of the draft regulation on R&D).

Lastly, UNICE is of the view that the Commission should clarify the situation as regards severability. UNICE considers that there should be severability for hard-core restrictions. It should thus be clarified that the benefit of the block exemption regulations is not in jeopardy for the entire agreement if a dispute were to arise as to whether there is actually a hard-core situation.

Definitions

As a general point, UNICE suggests the Commission relocates Article 4 of the draft regulation on R&D and Article 5 of the draft specialisation regulation, which set out the definitions, to the beginning of the regulations. This would render the block exemptions more clear and user-friendly.

In Article 4 (11) of the draft regulation on R&D, 'competing manufacturers' is defined as undertakings that are actual or potential producers of products capable of being improved or replaced by the contract products. Article 5 (6) of the draft regulation on specialisation defines a "competitor" as an undertaking that is an actual or potential competitor on the relevant market.

Inclusion of the word "potential" would make the concept of a competitor and competing manufacturers very broad. As regards competing manufacturers this is worsened since the category of products capable of being improved or replaced is ambiguous and potentially very wide in scope. UNICE suggests removal of the notion "potential" in the respective definitions and further clarification of the concept of products capable of being improved or replaced.

Withdrawal of the benefit of the block exemption

In Article 7 (d) of the draft regulation on R&D and Article 7 (b) of the draft regulation on specialisation, the Commission reserves the right to withdraw the benefit of the block exemption when the contract products are not subject in the whole or a substantial part of the common market to effective competition from identical products or products considered by users as equivalent in view of their characteristics, price and intended use.

UNICE notes that this provision is of no real practical relevance as regards specialisation agreements and R&D agreements between competing manufacturers. If such agreements are covered by the block exemption regulation there is effective competition because in that case the undertakings concerned do not have a combined market share which exceeds the market share thresholds. UNICE suggests therefore that the Commission deletes this provision, especially since R&D co-operation between non-competitors generally does not restrict competition.

Non-opposition procedure

UNICE notes that the Commission proposes to delete the non-opposition procedure from the R&D regulation, because it considers that this procedure is no longer necessary as all restrictions are now going to be dealt with in the new block exemption regulation on R&D. Although UNICE acknowledges that all restrictions other than hard-core are going to be exempt subject to certain conditions, UNICE wishes to point out that the draft block exemption regulations can still give rise to uncertainty as regards the validity of certain restrictions. UNICE therefore regrets deletion of the non-opposition procedure. UNICE considers that a non-opposition procedure should continue to be available (possibly in combination with a reduced information obligation) in case parties wish to obtain further clarity as regards the validity of certain restrictions. In this context, UNICE wishes to repeat that it believes that the new procedural framework should also provide for the possibility to notify agreements retroactively as is currently the case for vertical agreements (see above).

4. PURCHASING AGREEMENTS

UNICE is pleased that the Commission in section 4 of the draft guidelines provides guidance on agreements concerning the joint buying of products. UNICE disagrees however that joint buying is to be assessed by taking a 15% combined market share on both the purchasing market(s) and the selling market(s) into account. In UNICE's view the Commission underplays the pro-competitive effects of joint buying and overestimates the negative effects on competition of a 15% market share. Application of a combined market share of 15% on both markets would trigger application of Article 81 (1) to most joint purchasing agreements whilst there is no real danger of severe negative effects on competition. UNICE suggests the Commission increases the market share reference and focuses more prominently on the markets downstream where the participants of the joint purchasing arrangement are active as sellers. This would also be consistent with the approach taken in the *De Minimis* Notice.

5. BLOCK EXEMPTIONS AND NATIONAL LAWS

UNICE expects that the method of analysing co-operation agreements as set out in the guidelines will lead to more agreements falling outside the scope of Article 81 (1). These agreements might consequently 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).

_____