



International Chamber of Commerce

The world business organization

Policy statement

Follow-up communication to EC Green Paper on vertical restraints

Commission on Law and Practices relating to Competition, 21 January 1999

French version

ICC is the world business organization, grouping thousands of member companies and associations from over 130 countries, many of whom operate distribution systems in Europe.

ICC welcomes the European Commission's "Communication on the application of the Community competition rules to vertical restraints", the follow-up document to the Green Paper on Vertical Restraints, and applauds the Commission's initiative to reform its policy on vertical restraints.

In particular, ICC supports the adoption of a single, broad-based block exemption covering all vertical restraints.

ICC believes, however, that the proper balance between the more economic approach towards vertical restraints proposed by the Commission and legal certainty for companies, has yet to be achieved. ICC has particular concerns that the combination of market share criteria and the exclusion of several commercially sensible arrangements from the benefits of the block exemption (black clauses) unnecessarily aggravates legal uncertainty for companies operating in Europe.

Below are ICC's comments on specific points.

a) Guidelines

ICC welcomes the Commission's plan to publish interpretative guidelines when issuing the block exemption. We hope that the Commission will rapidly prepare a draft proposal for consultation with interested parties, including the international business community which is directly concerned. Without knowing the content of the guidelines, it will be impossible to pass definitive judgement on the proposals for the block exemption itself.

One important issue, which the guidelines should cover, is the treatment of agreements falling outside the scope of the block exemption. It should be clearly spelled out that such agreements are not necessarily excluded from an individual exemption under Article 85 (3). It will be essential to provide meaningful guidance on the application of Article 85 (3) outside the scope of the block exemption as part of the Commission's stated goal of reforming its policy in the area of vertical restraints. In particular, such guidelines would be very useful to indicate what criteria the Commission will use to make an economic analysis of market power for individual exemptions. Individual enterprises, domestic courts and national competition authorities will need this guidance.

As the Commission recognizes that there will inevitably be a degree of uncertainty created by the market share cap – which, as the Commission itself admits, is not the best indicator of market power – we believe that other economic criteria should also be taken into account. Even when a company is over the required market share threshold, we recommend that an agreement should be covered by the block exemption in the case where both the market share of its direct competitor, and the market power of the distributor with whom the agreement is made, are substantial.

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We also wish to underline the importance of ensuring consistency in the enforcement of the future guidelines in the various member states. It would be unacceptable to the business community if an agreement were to be prohibited in one member state and authorized in others.

We would also recommend that the relationship between long term investments and duration limits be taken into account in the guidelines.

b) Transitional period

We note that the Commission already foresees providing a transitional period for the agreements covered by an existing block exemption. It is our view that this period should be of at least five years duration. We are extremely concerned as to the effects on contracts which would have been previously valid under local civil laws, in particular in the case of long-term contracts.

c) Market share thresholds

We would like to restate our concerns about the implementation of the market share test, which could lead to greater, rather than less, legal uncertainty. This may in turn lead to more agreements being notified, contrary to the Commission's objective. As stated in our previous comments on this issue, market share thresholds are difficult to apply in practice and can create discrimination between undertakings, depending upon the vagaries of their market success for different products. This is particularly true for companies dealing in innovative products for which their market share is volatile. We also bring to the Commission's attention the risk, if parties are forced to terminate their contracts because their market shares exceed the required thresholds, that this may lead to conflicts with national laws of contract in member states.

Despite these concerns, the proposal in the Communication retains market share criteria and proposes two alternative options: a single market share threshold yet to be fixed, or a two-threshold system with a main market share cap of 20% and a higher cap for certain vertical restraints of 40%.

Between the two options proposed by the Commission, we consider that a single market share would result in a clearer and simpler system for companies. We feel, however, that a higher single threshold of 40% should be retained to provide companies with more certainty for their operations.

With respect to the proposal for a two-tier system of market share limits, we consider that the exemption proposed for market shares between 20% and 40 % is far too narrow. Contrary to the exemption applying to a market share of below 20 %, the exemption covering market shares between 20% and 40 % covers only specifically designated vertical restraints, so that above a 20 % market share, only a limited group of clauses will benefit from the exemption.

d) Exclusive purchasing and protection of investment

We suggest that vertical restraints and their combinations should be exempted altogether, irrespective of market share, in all cases where the goods and services are sold by the buyer from the premises of the supplier.

Similarly, in cases where substantial investment has been made by either the supplier or reseller ICC believes that the regulation should provide for proportionality between the duration of the exemption and the investment made by the parties.

If suppliers and distributors are not able to fashion their contractual relationship in a way which would allow them to protect their investment in their commercial relationship, this may have the effect of driving suppliers away from the use of independent distributors and towards agents or wholly-owned subsidiaries. This may have the unwanted effect of running counter to the Commission's aim to promote the development of SMEs. This may also have a discriminatory effect against companies which are unable to vertically integrate their sales, as companies which use distributors will have less flexibility for their distribution arrangements than competitors which sell through wholly-owned subsidiaries or agents.

e) Black clauses

ICC has strong concerns that the breadth and complexity of the list of black clauses will exclude many economically sensible distribution systems from the block exemption and cause great legal uncertainty for companies operating distribution systems in Europe.

The combination of exclusive distribution with exclusive purchasing, for example, is an arrangement which promotes the legal security of both supplier and distributor, and justifies each party's investment in each other. The supplier would not provide the distributor with his know-how if he believed the distributor would be using this to the benefit of competitor companies.

ICC believes that the inclusion on the black list of such arrangements will drive manufacturers away from the use of independent distributors towards agents or wholly-owned subsidiaries for the purposes of their European distribution. This is in contradiction with the Commission's stated aim to avoid "a policy bias in the choice companies make concerning their formats of distribution" so that "the company's choice [is] based on commercial merit and not on unjustified difference in exemptability".
(see also paragraph (d) above)

To reduce this uncertainty, ICC recommends that the Commission reconsider its proposal not to apply the rule of severability. ICC believes that the validity of contracts containing black clauses should not be affected unless the black clause is judged to be essential to the agreement.

f) Retroactive application of individual exemptions

ICC welcomes the Commission's proposal that undertakings should be permitted to apply for an exemption with retroactive effect as from the start of the agreement in order to mitigate the legal uncertainty resulting from the use of market share limits. This measure will only be effective in reducing legal uncertainty however if:

a) the possibility of obtaining a retroactive exemption for vertical restraints is unqualified. A notifying party should not have to explain why the arrangement was not notified earlier or be denied a retroactive exemption if it did not notify for a particular reason; and

b) DG IV commits itself to deal with such notifications expeditiously as notifications of agreements are likely to occur in the context of a litigation and national judges may not be prepared to wait for a Commission determination.

g) Agency agreements

ICC wishes to remind the Commission that commercial agencies - widely used in some countries - remain properly outside the scope of Article 85(1).

h) Prevention or restriction of active or passive sales

Upon review of the hard-core restrictions listed in the Communication, it would appear that only restrictions on active sales competition within the territory of an exclusive distributor will be permitted. This represents a significant change compared to the present state of the law contained in Regulation n1983/83 which allows bans on active sales outside the exclusive distributor's contract territory.

This ban can be imposed irrespective of whether the supplier has appointed exclusive distributors in other territories. There is no reason to change this policy which is justified by the legitimate interest of the supplier to have the distributor focus its sales activities on the allocated territory.

i) Selective distribution

ICC notes the Commission's proposal to include selective distribution under the umbrella of the block exemption. We also note the recognition by the Commission that quantitative restrictions imposed on distributors may be justified. We question, however, the constraints under which selective distribution systems would be required to operate in order to benefit from the block exemption.

In the event that a two threshold system is retained, we object to the proposal made in previous drafts of the Communication to exclude individual selective distribution systems from the automatic exemption if the supplier has a market share in excess of 20 %. The Commission's ability to withdraw the benefit of the exemption should be sufficient to deal with possible cases of abuse of the selective distribution system. The market share limit of 20 % would introduce unacceptable discrimination among undertakings.

With respect to parallel networks of selective distribution agreements, ICC considers that competing companies and brands should be treated equally, and that the size of a company does not justify the application of a more favourable regime or of more stringent rules. There is a risk that inequality of treatment between companies or between brands will result in inequality of competition in a market where there is no foreclosure.

As the Commission recognizes, the conditions governing selective distribution under the block exemption should remain as close as possible to the policy formulated in established European Community law. Current jurisprudence does not support the condition that the nature of the good or service must "require" this type of distribution, as stated in the Communication. It is more correct and in keeping with economic reality to look at what is appropriate for the proper distribution of the product or service.

ICC thanks the Commission for its consideration of the above points, and looks forward to contributing its views on the draft guidelines and other texts prepared by the Commission in the context of the reform of its policy on vertical restraints.

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