International Chamber of Commerce
The world business organization

Policy statement

Comments on European Commission Proposals for reform relating to horizontal cooperation

Commissio n on Law and Practices relating to Competition, 29 May 2000

French version

The International Chamber of Commerce (ICC) is the world business organization. It is the only representative body that speaks with authority on behalf of enterprises from all sectors in every part of the world. Founded in 1919, it represents today over seven thousand member companies and associations from over 130 countries. ICC's purpose is to promote international trade, investment and the market economy system, including through ensuring fair and transparent competition policy which does not place undue burdens on business.

1. Introduction

The European Commission is undertaking a wide-ranging reform of its competition policy which will have an important impact on all businesses operating in the European Union as well as ramifications for competition policy worldwide. Within the context of this reform, it has issued a proposal to modify the regulatory framework governing horizontal agreements in the European Union, which consists of:

1. a category exemption regulation for specialization agreements;
2. a category exemption regulation for research and development agreements; and
3. guidelines for assessing the applicability of Article 81 to horizontal cooperation agreements (the Guidelines)

The regulations relating to specialization and to research and development agreements replace Regulation No. 417/85 and Regulation No. 418/85 respectively, both of which cease to be valid on 31 December 2000.

The Guidelines replace two communications hitherto issued by the Commission with respect to horizontal cooperation.(1) They are also intended to cover a broader field embracing the more widely adopted horizontal agreements, and to complement the category exemption regulations for specialization and research and development agreements. They are declared to be inapplicable to cases falling within the scope of regulations currently in force with respect to specific sectors such as transport and insurance, as well as those within the purview of Council Regulation No.4064/89 relating to concentrations between undertakings.

2. General remarks

2.1 ICC welcomes the Commission's initiative to reform the treatment of horizontal cooperation agreements, a reform which ICC considers to be necessary. It believes however that the current proposal has several defects and urges the Commission to allow sufficient time for their revision to ensure that the final regulatory framework is coherent, user-friendly, and provides a sufficient degree of legal certainty for companies.

2.2 ICC also urges the Commission to take a clear and positive stand in favour of horizontal cooperation not impinging on hard core restrictions, contrary to the currently ambiguous position taken in the Guidelines.

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2.3 According to the Commission, Council Regulation No. 2821/71 constitutes the legal basis of the new block exempt ion regulations. The legal basis of the Guidelines, on the other hand, is not stated in the Commission's proposal. The communication in which Commissioner Monti requests the Commission to authorise his implementation of the procedure laid down in Article 6 of Council Regulation No. 2821/71 includes guidelines within such procedure, along with proposals for regulations. This would seem improper, as outlined later in section 4 of this document.

It is also contradictory. Guidelines are concerned with policy and programming, not the giving of orders. Their greatest value, indeed, lies in their flexibility and the way they can be adapted to new and changing situations in step with the developmental needs of the Community as identified by the Commission. It would thus be advisable for the Commission to refrain from generating confusion over the compass of the Guidelines and put them forward as what they really are, namely the enunciation of non-binding criteria proffered by the Commission to enterprises to help them to assess whether or not their horizontal cooperation is subject to the provisions of Article 81.

2.4 The European Commission began to work on the regulation of horizontal agreements towards the end of 1997. It was not until 27 April 2000 that the official texts of the proposed version of the two category exemption regulations and the horizontal cooperation guidelines appeared in the Official Journal. The short period of thirty days allowed for the submission of comments is unacceptable in view of the vastness of the material and the complexity of many critical points requiring careful analysis.

ICC is of the opinion that the Commission should not refuse to prolong the time allowed for the presentation of observations on the proposed specialization and research and development regulations at least until 30 June 2000.

The deadline for presentation of comments on the Guidelines, on the other hand, should be extended till at least 31 July 2000 to allow thorough assessment of the many formal and substantial questions they raise.(2) This postponement should not cause any difficulties since the guidelines are replacing notices which do not have an expiry date. They can thus be replaced by the new guidelines even after 31 December 2000.

3. The block exemption regulations.

The draft exemption regulations, especially the one relating to specialization agreements, constitute an improvement with respect to the corresponding regulations currently in force. Even so, and despite the laudable intention expressed by the Commission, they are still remarkably complicated and hard to understand.

A first examination of the contents of the two block exemption regulations leads to the preliminary main considerations listed here below.

3.1 The conditions governing the exemption of a particular category are often so numerous and complex as to render it very difficult to determine whether or not it can be applied.

3.2 It is hard to understand why so many black clauses have been incorporated in Article 5 of the draft R&D block exemption. The black list should be concise and clear in order to enhance legal certainty.

3.3 ICC submits that the black list should only apply in instances where the parties are competing manufacturers. If the parties are not so, competition is not restricted.

3.4 Elimination of the "white clauses" contemplated by the existing regulations can be regarded as a gain all in all. It gives the parties greater freedom to draft cooperation agreements that reflect their real needs in this regard. On the other hand, it diminishes the degree of legal certainty at their disposal.

3.5 The condition set forth under Article 2(3) of the R&D block exemption should be amended so as to allow:
- field of use restrictions on the exploitation of the results (such restrictions are of the essence in R&D cooperation with parties having complementary skills and knowledge);
- contractual restraints on the exploitation of pre-existing technical knowledge (there is no justification for limiting contractual freedom in that respect)

3.6 Article 2(2) of the same proposal, which requires that each party has access to all results of the R&D work, should be amended so that:
- parties are able in their contractual freedom to grant access only to part of the results if this reflects the different input of the parties
- the access does not automatically include the right of exploitation.

3.7 No ready justification can be found for differences in market thresholds used by the Commission with a common purpose, namely to act as a danger signal ensuring that sufficient levels of competition are maintained.

In the R&D block exemption, the increase in the threshold of market shares held by the participating enterprises from 20% to 25% must certainly be hailed as a step forward, though the establishment of a 30% threshold in the recent exemption regulations applicable to vertical agreements is a reference that should not be overlooked.

At the same time, the reduction from 25% envisaged in the preliminary draft of the specialization block exemption to the 20% adopted in the final version is not explained and is difficult to understand.

Adoption of market share as a cardinal criterion for the applicability of an exemption, as well as for the evaluation of the applicability of the first paragraph of Article 81 of the Treaty, is open to criticism (along with its systematic use in the Guidelines) Account should be taken of the fact that companies may find it difficult to determine the market share they control, particularly when new products are developed. Adoption of a threshold of at least 30% coupled with a 7-10% fluctuation margin would help to save them from making very prejudicial mistakes in their evaluations.(3)

For horizontal agreements, the "de minimis" communication sets a limit of 5% of the market share held altogether by the participating companies. How is this limit to be co-ordinated with the concept of combined market share provided in the proposed exemption regulations (specialization: 20%; research and development: 25%) and in the Guidelines (purchasing agreements:15%)?

3.8 All this points to a certain degree of arbitrariness on the part of the Commission in establishing th resholds of different levels.

The concept of a threshold above which the block exemption would not be applicable should be abandoned, since the relevant market and market shares are subject to continuous changes as a consequence of technological developments and of globalization. If the Commission considers that the threshold concept must remain, the level should be set at 30%, as is the case for vertical agreements.

However, if different levels are considered unavoidable, which seems highly questionable, then such thresholds should be explicitly reasoned, clearly defined and easy applicable.

3.9 The Communication on the "relevant market" should also be co-ordinated/updated. It should be kept in mind that, as regards geographical boundaries, not only the national, but also the European Community market may turn out to be inadequate in the context of the globalization process under way. Product markets have become even more difficult to determine in this age of rapid technological transformation.

3.10 As things stand, there is a risk that some national authorities may judge agreements falling below the limits set by the exemption regulations to be contrary to national law. While waiting for national laws to be effectively harmonized so that they come into line with EC standards, the national authorities should be specifically prevented through a Council Regulation from taking decisions incompatible with the block exemption regulations.

4. The guidelines for assessing the applicability of Article 81 to horizontal cooperation.

4.1 Aspects of a general character

4.1.1 The proposed Guidelines recognize, almost reluctantly, the existence of benefits for competition through horizontal cooperation but are almost overly quick to indicate the inherent risks, adopting an ambiguous attitude towards horizontal agreements. ICC encourages the Commission to take a clear and positive stand in favour of horizontal cooperation not impinging on hard core restrictions.

4.1.2 Insofar as they set out to govern forms of cooperation other than agreements falling within the compass of the specialization and research and development exemption regulations, these guidelines should be considered ultra vires. The Commission's powers, in fact, are laid down by Council Regulation 2821/71 and confined to the issue of category exemptions by means of regulations regarding standards, research and development and specialization.

The Commission is thus open to criticism on institutional grounds for its resort to guidelines as a tool for getting round the limits imposed by the Council's Regulation instead of correctly embarking upon its modification by way of extension. This choice is also the source of serious adverse consequences as far as enterprises are concerned, since they will not find in the guidelines the level of legal certainty they need for their operations.

4.1.3 It is evident that the establishment of specific block exemption regulations for other forms of horizontal cooperation (purchasing, commercialisation and environmental agreements) would be appropriate. Better still, a single, but complete and detailed set of exemption regulations should cover all forms of horizontal cooperation - including strategic alliances and outsourcing which have not been considered by the proposed Guidelines - as in the case of vertical cooperation.

Since it would take some time to get the necessary enabling Regulation from the Council, the present block exemptions would have to be prolonged as much as necessary. The benefits of the delay would certainly outweigh the disadvantages.

4.2 Specific aspects
The Guidelines are heavily tainted by their "original sin". Their ambiguous, arbitrary and contradictory text makes them of little use to enterprises even as a tool for self-evaluation.

Some examples are listed here below.
4.2.1 It would appear that the Guidelines introduce the "rule of reason" by suggesting that due account be taken of both the favourable and the adverse effects of horizontal agreements on the market. An innovation of this kind could not help but be warmly welcomed by enterprises. In practical terms, however, it could lead to substantial draining of the function of the third paragraph of Article 81. This, in turn, would require amendment of the current wording of this article and hence of the Treaty of Rome by means of a formal action on the part of the Council. In other words, the innovation could be deemed illegal, to the detriment of the activities of undertakings that have relied upon it.

4.2.2 The Guidelines establish that the "centre of gravity" rule shall be applied to agreements that combine various levels of cooperation. According to this rule, the system to be applied to the agreement in question will be determined by the main activity. Quite apart from the complexity of

applying such a rule in practice, no solution is indicated for the situation in which it is not possible to establish the main activity.

4.2.3 According to the Guidelines, sub-contracting agreements are covered according to their structure respectively by:
- The Block Exemption Regulation and the Guidelines on Vertical Restraints
- The new Guidelines on Horizontal Agreements
- The Commission Notice dated 3.1.1979

The above situation is far from improving easy application and legal certainty. ICC suggests that the whole subcontracting issue continues to be governed by the 1979 Notice.

4.2.4 If the commonality in costs deriving from a certain production or purchasing agreement represents an important share of the total costs, the Guidelines presume that such a situation may be interpreted to determine that there is a co-ordination of market prices and output. Since it is logical to believe that if the quota of total costs were not important, companies would have little interest in stipulating agreements of this kind, this position corresponds in practice to discouraging (if not forbidding) agreements of this kind.

4.2.5 The treatment given to purchasing agreements in the Guidelines seems somewhat twisted. Apart from the very low threshold of 15%, the concept of "purchasing power" is extended at will. The purchasing power should only be considered a factor that distorts competition if it is exercised by a single purchaser capable of strangling suppliers whose survival substantially depends on him. The Commission has considered some pathologies which appear abstract. And lastly: why can the cost savings achieved simply by exercising purchasing power only be exempted if they are passed on to consumers without an evaluation case by case?

4.2.6 With particular reference to environmental agreements, the attitude of the Commission that emerges from the Guidelines is to prevent companies from gaining a competitive edge. Such an attitude is hardly likely to encourage companies to sustain costs and make investments to manufacture new products or improve already manufactured ones if they are then unable to use them as an advantage over their competitors.

5. Conclusions

5.1 ICC agrees that the European Commission's treatment of horizontal cooperation agreements needs to be reformed; it therefore considers the Commission's action in a positive light. However, this opportunity should not be wasted by passing incomplete, non-homogeneous and poorly applicable new rules which, in the final analysis, would not increase the level of legal certainty required by companies.

5.2 The Guidelines proposed by the Commission should be thoroughly reviewed. Instead of trying to cover a great number of theoretical and minor cases, the Guidelines should concentrate on the main ones.

5.3 Should the Commission continue with its present regulatory methodology, the following substantial concern would be plainly justified. On one hand, the complexity of the tools worked out by the Commission (the new regulations and the new Guidelines) would require a strong commitment for a continous dialogue between the Commission and undertakings in order to ensure a balanced and effective application of the new body of rules. On the other hand, the Commission's priorities stated in the White Book on competition policy reform are clearly in the sense of stepping back from the day-to-day involvement in applying competition rules and a concentration of the Commission's resources on more political issues such as the EU's development, the removal of structural and legislative barriers to such development, and the push for a full process of liberalisation within the European Economic

Space. ICC will support and welcome all the Commission's efforts to find a way of resolving such apparent incoherences.

5.4 ICC is confident that, following the successful experience with vertical agreements, a wide and exhaustive process of consultation with all interested parties will also be carried out for horizontal agreements. ICC urges that the business community be given enough room and time within this process to contribute effectively to this reform which has important implications for the development of enter prises.

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FOOTNOTES
(1) Communications dated 29.7/28.8.1968 concerning cooperation between enterprises; Communication dated 3.1.1979 concerning subcontracting agreements; Communication dated 16.2.1993 concerning common enterprises of a cooperative nature.
(2) It should be noted in this connection that the Federal Trade Commissioner and the Department of Justice have established a term of three months for comments on their proposed joint guidelines for collaboration among competitors, published in October 1999.
(3) For new products, the presumption could be adopted that competition is not restricted for a period of two years after the product is first put on the market, irrespective of the market share of the company (see Guidelines on vertical restraints, section 1.3 (10) paragraph 119).