

EUROPEAN ECONOMIC AREA  
STANDING COMMITTEE  
OF THE EFTA STATES

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Brussels

**WORKING GROUP ON COMPETITION POLICY**

**Comments by the EFTA Working Group on the Commission Draft  
Communication on the application of EC Competition rules to vertical restraints**

**I. INTRODUCTION**

1. The EEA/EFTA States welcome the proposed new policy (the Proposal) based on economics rather than form, one broad block exemption with market shares through a graduated approach and modification of Article 4 (2) of Regulation 17/62. We support the general principles on which the new system is based. The Proposal is very much in line with the EFTA position on the Green Paper on vertical restraints, which was submitted to the Commission on 31 July 1997.

2. Since the Guidelines will form an important part of the new policy, it is difficult at this stage of the process to have a total overview of the impact of the proposed policy. However, the EEA/EFTA States hope to get an opportunity to give comments on the Guidelines in due course.

3. Although The Commission issued a new De Minimis Notice last year, there are reasons to believe that it will be necessary to review the Notice in light of the new policy on vertical restraints.

**II. THE NEED FOR SIMPLIFICATION**

4. A general observation is that the system is too complex, and should be simplified. The definitions should be clearer and more specific. The various lists of what is permissible and not under the different forms of vertical restraints and thresholds may reintroduce «clause fiddling». From a practical point of view, the system may be difficult to work with because of the inherent demarcation problems.

**III. SCOPE**

**Supply of goods and services for resale/transformation/incorporation**

5. In the EFTA position on the Green Paper it was proposed to extend the block exemption to services and goods for processing. Hence we are quite satisfied with Article 1 (1) of the Proposal. At the meeting in June, representatives from the

Commission stated that production would not be included in the block exemption. In practice, the business community may have problems drawing a line between what is included and what is not. Therefore, we hope that this distinction will be addressed in the Guidelines.

### **Selective Distribution**

6. The EEA/EFTA States believe that selective distribution should be covered by the block exemption to the extent Article 85 of the EC Treaty/Article 53 of the EEA Agreement is applicable to such agreements. In our view, such restraints are in general not more harmful to competition than exclusive distribution, and should thus be treated similar to such agreements within the framework of the block exemption.

### **Associations of Independent Retailers**

7. In the EFTA position on the Green Paper, it was proposed to include associations of independent retailers in the new block exemption. Such associations are likely to include horizontal, as well as vertical restraints in their agreements. It is difficult to draw a demarcation line between vertical and horizontal restrictions based on the wording of the Proposal. It is therefore important that the Guidelines include a more specific wording.

8. Although we do not believe that the horizontal aspects should be covered by a policy on vertical restrictions, it is important to stress that associations of independent retailers should not be treated differently depending on whether the restraints are vertical or horizontal, if the effect on competition or market integration is similar.

9. The Commission might consider treating associations of independent retailers under a separate policy, including vertical as well as horizontal restrictions.

### **Ancillary restraints**

10. In the EFTA position on the GP, it was proposed that a new BE should include a provision automatically exempting ancillary restraints. It is our view that such an inclusion would lead to greater flexibility.

## **IV. MARKET SHARE THRESHOLDS**

11. The EEA/EFTA States believe that the market share threshold should be relatively high. A market share threshold of 40 % is in accordance with our previous comments. However, the inclusion of such a high threshold necessitates the introduction of duration limits on restraints that represent a barrier to entry.

12. The EEA/EFTA States have not taken a final stand on whether to support a dual market share threshold system. However, if such a system is introduced, we agree that a 20 % threshold would be appropriate. We agree with the advantages of a system with two thresholds put forward by DG IV. However, combined with the other conditions of the block exemption, there is a risk that the system will become too complicated.

13. Under a dual market share system, the Commission might consider an alternative approach on the allocation of vertical restraints between the two market share thresholds. The EEA/EFTA States believe that a distinction between restrictive and less restrictive clauses may not be the best way to differ between various kinds of vertical restraints under such a system. A less restrictive clause may very well have more harmful effects on competition than a restrictive one. The net effect of a restrictive clause depends on the context in which it is functioning.

14. Some vertical restraints, like exclusive territories, have a competition dampening effect, indicating that they should be covered by the lowest market share threshold. Other vertical restraints, like exclusive purchasing, have adverse effects by foreclosing market access to potential competitors. This, however, presupposes that inter-brand competition is already significantly reduced. If there are no dominant suppliers on the market, an exclusive purchasing clause in an agreement may in fact stimulate competition. Consequently, exclusive purchasing and its less restrictive substitutes should be covered by the market share threshold.

15. The EEA/EFTA States believe that an alternative approach to the allocation of vertical restraints between the two market share thresholds could be to exempt restrictive distribution arrangements up to a 20 % market share, and exempt restrictive purchasing arrangements up to a 40 % market share. In this context, selective distribution agreements should be treated as exclusive distribution agreements.

## **V. THE BLACK LIST**

16. The EEA/EFTA States are in favour of a black list approach, and find that the omission of a white list represents an improvement. However, the proposed black list seems too long and too complicated. Some of the definitions could have been clearer. An alternative approach, which is focused on the effects of the restraints rather than on including different kinds of restraints and combinations of restraints, would in our view be preferable.

17. In addition, we question whether some of the restraints should be included in the black list as hard core restrictions. We suggest that the black list be limited to restraints

which have clearly negative effects on competition or which prevent market integration;  
i.e. that the black list be limited to the first four items in Article 2.

## **VI. SMALL AND MEDIUM SIZED ENTERPRISES (SME)**

18. The EEA/EFTA States do not support a general exemption for SMEs. A turnover threshold is in our view not in line with a more economic based approach to vertical restraints. For smaller economies like the EEA/EFTA States, a company with a turnover of 150 mill. ECU is rather a large company. Consequently, it would be difficult for us to accept that the market share threshold as a general condition for exemption shall not apply to such undertakings.

19. If the Commission decides to include an exemption for SMEs, it would be imperative that the Member States/EFTA States be given the competence to withdraw the benefit of the block exemption, see further below.

## **VII. WITHDRAWAL**

20. A withdrawal procedure secures the possibility of individual treatment of agreements that turn out to have negative effects on competition. In line with the general aim of the decentralised application of the EC/EEA competition rules, Member States/EFTA States should be entrusted with the power to withdraw the benefit of the block exemption. As already mentioned above, this is particularly important if the Commission decides to include a general exemption for SMEs.

21. Further, in such cases it should be a prerequisite that Member States/EFTA States may apply their national competition legislation if the States in question are not empowered with the competence to apply Article 85 EC/Art. 53 EEA.

22. Commission practice has shown that it is difficult to withdraw the benefit of a block exemption. Thus, it is important to establish a clear and speedy procedure that will also ensure legal certainty in order to give national authorities the necessary instruments for withdrawal.

## **VIII. LIMITS OF DURATION**

23. The EEA/EFTA States believe that the introduction of duration limits should be considered in connection with market share thresholds. In our opinion there is no need to include duration limits for vertical restraints below the 20 % market share cap. However, above this market share threshold, it is appropriate to impose such limitations on restraints that represent barriers to entry.

**IX ARTICLE 4 (2) OF REGULATION 17/62**

24. The EEA/EFTA States welcome the proposal to include vertical distribution agreements in Article 4 (2) of Regulation 17. Like other delegations participating in the meeting in June, we believe it would be timely to review Regulation 17 as such and not only limit the discussion to Article 4. However, we understand from the Commission that it does not consider this to be the right moment to bring up other issues under Regulation 17/62.

25. We support the idea that a company, which makes a mistake in assessing its market share, should not be punished for the fact that it has not notified its agreement. However, the question is how this new system will work in practise. We anticipate the risk of impediments to national proceedings. In cases where one party invokes nullity of an agreement and the dispute is taken to a national court, the national court may rule that the agreement is void. If the other party pleads that the agreement comes under Article 85(3) EC/53(3) EEA, the Court may have to await a decision by the Commission on the possible granting of an individual exemption.

26. At the June meeting the representatives from the Commission emphasised that their main worry is injunction cases and in such cases a national judge can make an evaluation of the likelihood of the application of Article 85(3) EC/53(3) EEA. With regard to other cases before the national courts, the EEA/EFTA States believe that swift responses from the Commission and clear deadlines for dealing with notifications in such circumstances would be needed.

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