ENVIRONMENTAL AGREEMENTS: COMMISSION GUIDELINES

Subject: Environmental agreements
Relevant market
Market entry
Exemption

Industry: Most industries

Source: Commission paper entitled Draft Guidelines on the Application of Article 81 to horizontal cooperation

(Note. This is the last in the series of extracts from the Commission's paper, whose value to industry is that it sets out clearly the Commission's policy towards the different types of horizontal agreements and is therefore helpful to those drafting these agreements and implementing them. On the face of it, the types of agreement which are partly or mainly directed towards environmental protection or improvement are highly desirable from a social point of view. However, it is not too difficult to imagine circumstances, such as a collective boycott of a given product, in which environmental considerations are offered as a justification for anti-competitive trading or, as the Commission puts it, "if the cooperation does not truly concern environmental objectives, but serves as a tool to engage in a disguised cartel". The Commission's guidelines indicate the boundaries between what is permissible and what is not on the basis of the same classification as in other sections of the guidelines: that is, agreements which are not covered by Article 81(1), agreements which are almost always covered and agreements which may be covered. The section of the guidelines on environmental agreements is a little short on examples: the one example set out here illustrates only too well the uncertainty arising in specific cases. "On the one hand, the agreement restricts competition and causes price increases; on the other hand, this may result in the development of new and better products, so that the agreement should be exempted.")

7. ENVIRONMENTAL AGREEMENTS

7.1. Definition

171. Environmental agreements are those by which the parties undertake to achieve pollution abatement, as defined in environmental law, or environmental objectives, in particular, those set forth in Article 174 of the EC Treaty. (The term "agreement" is used in the sense defined by the European Community Counts in the case law on Anticle 81. It does not necessarily correspond to the definition of an "agreement" in Commission documents dealing with environmental issues such as the Communication on environmental agreements, COM (96) 561 final of 27 November, 1996.) Therefore, the target or the measures agreed need to be directly linked to the reduction of a pollutant or a type of waste identified as such in relevant regulations. For instance, a national agreement phasing out a pollutant

or waste identified as such in relevant community directives may not be assimilated to a collective boycott on a product which circulates freely in the community. This excludes agreements that trigger pollution abatement as a by-product of other measures.

172. Environmental agreements may set forth standards on the environmental performance of products (inputs or outputs), or production processes. To the extent that some environmental agreements could be assimilated to standardisation, the same assessment principles for standardisation apply to them. Other possible categories may include agreements at the same level of trade, whereby the parties provide for the common attainment of an environmental target such as recycling of certain materials, emission reductions, or the improvement of energy-efficiency.

173. Comprehensive, industry-wide schemes are set up in many Member States for complying with environmental obligations on take-back or recycling. Such schemes usually comprise a complex set of arrangements, some of which are horizontal, while others are vertical in character. To the extent that these arrangements contain vertical restraints they are not subject to these guidelines.

7.2. Relevant markets

174. The effects are to be assessed on the markets to which the agreement relates, which will be defined according to the relevant notice. When the pollutant is not itself a product, the relevant market encompasses that of the product into which the pollutant is incorporated. As for collection/recycling agreements, in addition to their effects on the market on which the parties are active as producers or distributors, the effects on the market of collection services potentially covering the good in question must be assessed as well.

7.3. Assessment under Article 81(1)

175. Some environmental agreements may be encouraged or made necessary by State authorities in the exercise of their public prerogatives. The present guidelines do not deal with the question of whether such State intervention is in conformity with the Member State's obligations under the EC Treaty. They only address the assessment that must be made as to the compatibility of the agreement with Article 81.

7.3.1. Nature of the agreement

7.3.1.1. Agreements that do not fall under Article 81(1)

176. Some environmental agreements are not likely to fall within the scope of the prohibition of Article 81(1), irrespective of the aggregated market share of the parties.

177. This may arise if no precise individual obligation is placed upon the parties or if they are loosely committed to contributing to the attainment of a sector-wide

environmental target. In this latter case, the assessment will focus on the discretion left to the parties as to the means that are technically and economically available in order to attain the environmental objective agreed upon. The more varied such means, the less appreciable the potential restrictive effects.

178. Similarly, agreements setting the environmental performance of products or processes that do not appreciably affect product and production diversity in the relevant market or whose importance is marginal for influencing purchase decisions do not fall under Article 81(1). Where some categories of a product are banned or phased out from the market, restrictions cannot be deemed appreciable insofar as their share is minor in the relevant geographic market or, in the case of EU-wide markets, in all Member States.

179. Finally, agreements which give rise to genuine market creation, for instance recycling agreements, will not generally restrict competition, provided that and as long as, the parties would not be capable of conducting the activities in isolation, whilst other alternatives and/or competitors do not exist.

7.3.1.2. Agreements that almost always come under Article 81(1)

180. Environmental agreements come under Article 81(1) by their nature if the cooperation does not truly concern environmental objectives, but serves as a tool to engage in a disguised cartel, i.e. otherwise prohibited price fixing, output limitation or market allocation, or if the co-operation is used as a means amongst other parts of a broader restrictive agreement which aims at excluding actual or potential competitors.

7.3.1.3. Agreements that may fall under Article 81(1)

181. Environmental agreements covering a major share of an industry at national or EC level are likely to be caught by Article 81(1) where they appreciably restrict the parties' ability to devise the characteristics of their products or the way in which they produce them, thereby granting them influence over each others production or sales. In addition to restrictions between the parties, an environmental agreement may also reduce or substantially affect the output of third parties, either as suppliers or as purchasers.

182. For instance, environmental agreements, which may phase out or significantly affect an important proportion of the parties' sales as regards their products or production process, may fall under Article 81(1) when the parties hold a significant proportion of the market. The same applies to agreements whereby the parties allocate individual pollution quotas.

183. Similarly, agreements whereby parties holding important market shares in a substantial part of the common market appoint an undertaking as exclusive provider of collection and/or recycling services for their products, may also appreciably restrict competition, provided other actual or realistic potential providers exist.

7.4. Assessment under Article 81(3)

7.4.1. Economic benefits

184. The Commission takes a positive stance on the use of environmental agreements as a policy instrument to achieve the goals enshrined in Article 2 and Article 174 of the EC Treaty as well as in Community environmental action plans (Vth Environmental Action Programme (OJ C 138, 17.5.1993, p.1); EP and Council Decision 2179/98/EC of 24.9.1998 (OJ L 275 of 10.10.1998, p.1)), provided such agreements are compatible with competition rules. (Communication on environmental agreements, COM (96) 561 final of 27.11.1996, §§ 27-29 and Article 3(1)(f) of Decision 2179/98/EC. The Communication ineludes a "Checklist for Environmental Agreements" identifying the elements that should generally be included in such an agreement.)

185. Environmental agreements caught by Article 81(1) may attain economic benefits which, either at individual or aggregate consumer level, outweigh their negative effects on competition. To fulfil this condition, there must be net benefits in terms of reduced environmental pressure resulting from the agreement, as compared to a baseline where no action is taken. In other words, the expected economic benefits must outweigh the costs. (This is consistent with the requirement to take account of the potential benefits and costs of action or lack of action set forth in Article 174(3) of the EC Treaty and Article 7(d) of Decision 2179/98/EC.)

186. Such costs include the effects of lessened competition along with compliance costs for economic operators and/or effects on third parties. The benefits might be assessed in two stages. Where consumers individually have a positive rate of return from the agreement under reasonable payback periods, there is no need for the aggregate environmental benefits to be objectively established. Otherwise, a cost-benefit analysis may be necessary to assess whether net benefits for consumers in general are likely under reasonable assumptions.

7.4.2. Indispensability

187. The more objectively the economic efficiency of an environmental agreement is demonstrated, the more clearly each provision may be deemed to be indispensable to the attainment of the environmental goal within its economic context.

188. An objective evaluation of provisions which *prima facie* may be deemed not to be indispensable must be supported with a cost-effectiveness analysis showing that alternative means of attaining the expected environmental benefits, would be more economically or financially costly, under reasonable assumptions. For instance, it should be very clearly demonstrated that a uniform fee, charged irrespective of individual costs for waste collection, is indispensable for the functioning of an industry-wide collection system.

7.4.3. No elimination of competition

189. Whatever the environmental and economic gains and the necessity of the intended provisions, the agreement must not eliminate competition in terms of product or process differentiation, technological innovation or market entry in the short or, where relevant, medium run. For instance, in case of exclusive collection rights granted to a collection/recycling operator with potential competitors, the duration of such rights should take into account the possible emergence of an alternative to the operator.

7.5. Examples

190. Example. *Situation:* Almost all EU producers and importers of a given domestic appliance (e.g. washing machines), agree, with the encouragement of a public body, to no longer manufacture and import into the EU products which do not comply with certain environmental criteria (e.g. energy efficiency). Together, the parties hold 90% of the EU market. The products which will be thus phased out of the market account for a significant proportion of total sales. They will be replaced with more environmentally friendly, but also more expensive products. Furthermore, the agreement indirectly reduces the output of third parties (e.g. electric utilities, suppliers of components incorporated in the products phased out). *Analysis:* The agreement grants the parties control of individual production and imports, concerns an appreciable proportion of their sales and total output, whilst also reducing third parties' output. Consumer choice, which is partly focused on the environmental characteristics of the product, is reduced and prices will probably rise. Therefore, the agreement is caught by Article 81(1). The involvement of the public authority is irrelevant for this assessment. However, newer products are more technically advanced and by reducing the environmental problem indirectly aimed at (emissions from electricity generation), they will not inevitably create or increase another environmental problem (e.g. water consumption, detergent use). The net contribution to the improvement of the environmental situation overall outweighs increased costs. Furthermore, individual purchasers of more expensive products will also rapidly recoup the cost increase as the more environmentally friendly products have lower running costs. Other alternatives to the agreement are shown to be less certain and less cost-effective in delivering the same net benefits. Varied technical means are economically available to the parties in order to manufacture products which do comply with the environmental characteristics agreed upon and competition will still take place for other product characteristics. Therefore, the conditions for an exemption under Article 81(3) are fulfilled. ■

On 26 October 2000, the Court of First Instance gave judgment in Case T-154/98, *Asia Motor France SA, in liquidation, and others v Commission of the European Communities*. This was the latest, and possibly the last, of the stages in litigation which began with a complaint to the Commission in 1985. In the course of previous litigation, the Commission was criticized by the Court for failing to treat correctly a number of complaints. This time, the Commission's defence was upheld and the case dismissed.