MARKETING AGREEMENTS: COMMISSION'S DRAFT GUIDELINES

Subject: Marketing agreements
Cooperation agreements
Information agreements

Industry: All industries

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

(Note. In the last issue, there was an item, from the same Commission document, on Production Agreements; this time, the subject is Marketing Agreements, or what the paper refers to as Commercialisation Agreements. The value of these sections of the Commission's paper lies in the useful summary which they provide of the law on, and of the Commission's policy towards, the treatment of those agreements under the EC rules on competition. For example, the section below clarifies the distinction between vertical and horizontal restraints in the matter of distribution and provides a reminder of the scope of the block exemption regulation covering distribution agreements. It also explains the rationale for the objections to agreements on the exchange of information: "the more concentrated the market the more useful information about prices or marketing strategy to reduce uncertainty and the greater the incentive for the parties to exchange such information" (paragraph 142, in which the relevant case-law is cited). If this comes a surprise to some companies, so too must the reminder that horizontal agreements may well be acceptable if, for example, they enable parties to enter a market they could not enter individually. Thus, consortia formed to allow companies to make a bid or tender may be justified, where the individual firms cannot compete with one another for the contract concerned. If they are not competitors, agreements between them are not anti-competitive. As in the last issue, the section reported here provides useful examples of the types of agreement concerned.)

5. COMMERCIALISATION AGREEMENTS

5.1. Definition

131. The agreements covered in this section involve co-operation between competitors in the selling, distribution or promotion of their products. These agreements can have a largely varying scope, depending on the marketing functions which are being covered by the cooperation. At the one end of the spectrum, there is joint selling that leads to a joint determination of all commercial aspects related to the sale of the product including price. At the other end, there are more limited agreements that only address one specific marketing function, such as distribution, service, or advertising.

132. The most important of these more limited agreements would seem to be distribution agreements. These agreements are generally covered by Block Exemption Regulation No. 2970/1999 and the Guidelines on Vertical Restraints unless the parties are actual or potential competitors. In this case, the Block Exemption Regulation No 2970/1999 only covers non-reciprocal vertical agreements between competitors, if (a) the buyer, together with its connected undertakings, has an annual turnover not exceeding 100 million Euro, or (b) the supplier is a manufacturer and a distributor of goods and the buyer is a distributor who is not also a manufacturer of goods competing with the contract goods, or (c) the stipplier is a provider of services at several levels of trade, while the buyer does not provide competing services at the level of trade where it purchases 'the contract services.[34] If competitors agree to distribute their products on a reciprocal basis there is a possibility in certain cases that the agreements have as their object or effect the partitioning of markets between the parties or that they lead to collusion. The same is true for non-reciprocal agreements between competitors exceeding a certain size. These agreements have thus first to be assessed according to the principles set out below. If this assessment leads to the conclusion that a cooperation between competitors in the area of distribution would in principle be acceptable, a further assessment will be necessary to examine the vertical restraints included in such agreements. This assessment should be based on the principles set out in the Guidelines on Vertical Restraints[35], for instance as regards the list of hardcore restrictions which are unlikely to be exempted in vertical agreements.

133. A further distinction should be drawn between agreements where the parties agree only on joint commercialisation and agreements where the commercialisation is related to another co-operation. This can be for instance the case as regards joint production or joint purchasing. These agreements will be dealt with as in the assessment of those types of cooperation.

5.2. Relevant markets

134. To assess the competitive relationship between the co-operating parties, first the relevant product and geographic market(s) directly concerned by the co-operation (i.e. the market(s) to which products subject to the agreement belong) have to he defined. Secondly, a commercialisation agreement in one market may also affect the competitive behaviour of the parties in a neighbouring market closely related to the market directly concerned by the cooperation.

5.3. Assessment under Article 81(1)

5.3.1. Nature of the agreement

5.3.1.1. Agreements that do not come under Article 8 1(1)

135. The commercialisation agreements covered by this section only fall under the competition iules if the parties to the agreements are competitors. If the parties clearly do not compete with regard to the products or services covered by the agreement, the agreement cannot be restrictive of competition. This also

applies if a co-operation in commercialisation is objectively necessary to allow one party to enter a market it could not have entered individually, for example because of the costs involved. A specific application of this principle would be consortia arrangements that allow the companies involved to mount a credible tender for projects that they would not be able to fulfil, or would not have bid for, individually. As they are therefore not potential competitors for the tender, there is no restriction of competition.

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

136. The principal competition concern about a commercialisation agreement between competitors is price fixing. Agreements limited to joint selling have as a rule the object and effect of co-ordinating the pricing policy of competing manufacturers. In this case they not only eliminate price competition between the parties but also restrict the volume of goods to be delivered by the participants within the framework of the system for allocating orders. They therefore restrict competition between the parties on the supply side and limit the choice of purchasers and fall under Article 81(l).

137. Tbis appreciation does not change if the agreement is non-exclusive. Article 81(1) continues to apply even where the parties are free to sell outside the agreement, as long as it can be presumed that the agreement will lead to an overall co-ordination of the prices charged by the parties.

5.3.1.3. Agreements that may come under Article 81(1)

138. For commercialisation arrangements that fall short of joint selling there will be two major concerns. The first is that the joint commercialisation provides a clear opportunity for exchanges of sensitive commercial information particularly on marketing strategy and pricing. The second is that, depending on the cost structure of the commercialisation, a significant input to the parties' final costs may be common. As a result the actual scope for price competition at the final sales level may be limited. Joint commercialisation agreements therefore can fall under Article 81(1) if they either allow the exchange of sensitive commercial information, or if they influence a significant part of the parties' final cost.

139. A specific concern related to distribution arrangements between competitors which are active in different geographic markets is that they can lead to or be an instrument of market partitioning. In the case of reciprocal agreements to distribute each other's products, the parties to the agreement allocate markets or customers and eliminate competition between themselves. The key question in assessing an agreement of this type is if the agreement in question is objectively necessary for the parties to enter each other's market. If it is, the agreement does not fall under 81(1). If it is not, the agreement falls under 81(1). If the agreement is not reciprocal, the risk of market partitioning is less pronounced. It needs however to be assessed if the non-reciprocal agreement constitutes the basis for a mutual understanding to not enter each other's market or is a means to control access to or competition on the 'importing' market.

5.3.2. Market power and market structure

140. As indicated above, agreements that involve price fixing will always fall under Article 81(1) irrespective of the market power of the parties. They may, however, be exemptable under Article 81(3) under the conditions described below.

141. Commercialisation agreements between competitors which do not involve price fixing are only subject to Article 81(1) if the parties to the agreement have some degree of market power. In most cases, it is unlikely that market power exists if the parties to the agreement have a combined market share of below 15%. In any event, at that level of market share it is likely that the conditions of Article 81(3) explained below are fulfilled by the agreement in question.

142 If the parties' combined market share is larger than 15%, the likely impact of the joint commercialisation agreement on the market must be assessed. In this respect market concentration, as well as market shares will be a significant factor. The more concentrated the market the more useful information about prices or marketing strategy to reduce uncertainty and the greater the incentive for the parties to exchange such information. (The exchange of sensitive and detailed information which takes place in an oligopolistic market might as such he caught by Article 81(1). The judgments of 28 May 1998 in the "Tractor" cases (C-8/95 P, *New Holland Ford* and C-7/95 P, *John Deere*) and of 11 March 1999 in the "Steel Beams" cases (T-34/94 et seq) provide useful clarification in this respect.)

5.4. Assessment under Article 81(3)

5.4.1. Economic Benefits

143. The efficiencies to be taken into account when assessing whether a joint conimercialisation agreement can be exempted wilt depend upon the nature of the activity. Price fixing can generally not be justified, unless it is objectively necessary for the integration of other marketing functions, and this integration will generate substantial efficiencies. The size of the efficiencies generated depends *inter alia* on the importance of the joint marketing activities for the overall cost structure of the product in question. Joint distribution is thus more likely to generate significant efficiencies for producers of widely distributed consumer goods than for producers of industrial products which are only bought by a limited number of users.

144. In addition, the claimed efficiencies should not be savings which result only from the elimination of costs that are inherently part of competition, but must result from the integration of economic activities. A reduction of transport cost which is only a result of customer allocation without any integration of the logistical system can therefore not be regarded as an efficiency that would make an agreement exemptable.

145. Claimed efficiency benefits must be demonstrated. An important element in this respect would be the contribution by both parties of significant capital,

technology, or other assets. Cost savings through reduced duplication of resources and facilities can also be accepted. If, on the other hand, the joint commerciatisation represents no more than a sales agency with no investment, it is likely to be a disguised cartel and as such can not fulfil the conditions of Article 81(3).

5.4.2. Indispensability

146. A commercialisation agreement can not be exempted if it imposes restrictions that are not indispensable to the attainment of the above-mentioned benefits. As discussed above, the question of indispensability is especially important for those agreements involving price fixing or the allocation of markets.

5.4.3. No ehmination of competition

147. Joint commercialisation agreements can never been exempted if they enable the parties to eliminate competition in respect of a substantial part of the products in questions. In making this assessment, the combined market shares of the parties can be regarded as a starting point. One then needs to evaluate whether these market shares are indicative of a dominant position, and whether there are any mitigating factors, such as the potential for market entry. Arrangements between competitors who have a combined market share equivalent to dominance will not normally fulfil the conditions of Article 8 1(3).

5.5. Examples

148. Example 1

Situation: 5 small food producers, each with 2% market share of the overall food market, agree to: combine their distribution facilities; market under a common brand name; and sell their products at a common price. This involves significant investment in warehousing, transport, advertising, marketing and a sales force. It significantly reduces their cost base, representing typically *50%* of the price at which they sell, and allows them to offer a quicker more efficient distribution system. The customers of the food producers are large retail chains.

Three large multinational food groups dominate the market, each with 20% market share. The rest of the market is made up of small independent producers. The product ranges of the parties to this agreement overlap in some significant areas. But in no product market does their combined market share exceed 15%.

Analysis: The agreement involves price fixing and thus falls under Article 81(1), even though the parties to the agreement can not be considered as having market power. However, the integration of the marketing and distribution appears to provide significant efficiencies which are of benefit to customers both in terms of improved service, and lower costs. The question is therefore whether the agreement is exemptable under Article 81(3). To answer this question it must be established whether the price fixing is objectively necessary for the integration of the other marketing functions. In this case, the price fixing can be regarded as

necessary, as the clients - large retail chains - do not want to deal with a multitude of prices. It is also necessary, as the aim - a common brand - can only be achieved credibly if all aspects of marketing, including price, are standardised. As the parties do not have market power and the agreement creates significant efficiencies it is compatible with Article 81.

149. Example 2

Situation: 2 producers of ball bearings, each having a market share of 5%, create a sales joint venture which will market the products, determine the prices and allocate orders to the parent companies. They retain the right to sell outside this structure. Customers continue to be delivered directly from the parents' factories. They claim that this will create efficiencies as the joint sales force can demonstrate the parties' products at the same time to the same client thus eliminating a wasteful duplication of sales efforts. In addition, the joint venture would, wherever possible, allocate orders to the closest factory possible, thus reducing transport costs.

Analysis: The agreement involves price fixing and thus falls under Article 81(1), even though the parties to the agreement cannot be considered as having market power. It is not
exemptable under Article 81(3), as the claimed efficiencies are only cost reductions derived from the elimination of competition between the parties.

150. Example 3

Situation: 2 producers of soft drinks are active in 2 different, neighbouring Member States. Both have a market share of 20% in their home market. They agree to reciprocally distribute each other's product in their respective geographic market. Both markets are dominated by a large multi-national soft drink producer, having a market share of 50% in each market.

Analysis: The agreement falls under Article 81(1) if the parties can be presumed to be potential competitors. Answering this question would thus require an analysis of the barriers to entry into the respective geographic markets. If the parties could have entered each other's market independently, than their agreement eliminates competition between them. However, even though the market shares of the parties indicate that they could have some market power, an analysis of the market structure indicates that this is not the case. In addition, the reciprocal distribution agreement benefits customers as it increases the available choice in each geographic market. The agreement would thus be exemptable even if it were considered to be restrictive of competition. ■

The full text of the foregoing document, and of related documents on the subject of horizontal agreements, may be found on the Commission's web-site. The full text of the EPAC case, reported on pages 191 to 200, is freely available on the Court's web-site; the text is not, however, definitive.