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COMMISSION REFORMS EC COMPETITION RULES ON HORIZONTAL COOPERATION

On 5 December 2000, the European Commission published two new Block Exemption regulations concerning horizontal cooperation: (i) Regulation 2658/2000 on specialization agreements, and (ii) Regulation 2659/20000 on research and development (R&D) agreements. These replace Regulations 417/85 and 418/85, respectively. The new Block Exemptions entered into force on 1 January 2001. The current Block Exemptions will remain in force for a transitional period until 30 June 2002.

Together with Guidelines on the application of Article 81 EC to horizontal cooperation agreements ("The Horizontal Guidelines") which were published on 6 January 2001, the two Block Exemptions form the basis of the Commission's modernization policy in this area of competition law.

The New Block Exemptions

The Block Exemptions reflect a number of key reforms:

I. No need to conform with "white lists" of required practices

The Block Exemptions follow the pattern of other recent block exemptions in removing so-called "white lists" of permitted practices. The concept is simpler - identify what is <u>not</u> allowed (so-called "black lists") and check whether the conditions for exemption are met.

II. Simplification of the black lists of prohibited practices

The Block Exemptions therefore only list those practices which must <u>not</u> be contained in an agreement. These "black lists" have been simplified for both Block Exemptions. In relation to specialization agreements, the following are prohibited: price-fixing, limitations of output or sales, and allocation of markets or customers. In relation to R&D agreements, the following are prohibited: restrictions on carrying out R&D separately, prohibitions on challenging IP rights, limitations of output or sales, price-fixing, certain restrictions as to customers and markets after seven years from product launch, prohibitions of passive sales, certain licensing restrictions, and restrictions relating to sale of the goods to resellers.

III. Increase of the market share ceilings for exemption

An agreement can only benefit from the Block Exemptions where the parties have <u>less than</u> defined market shares and if the agreement does not contain any black listed clauses. For both Block Exemptions the relevant ceilings have been increased. The R&D Block Exemption sets the ceiling at 25% market share held by the parties together, an increase from the previous 20%. The

Specialization Block Exemption sets the ceiling at a combined 20% market share. This is the same as the previous ceiling in relation to joint production agreements, but represents a 10% increase in relation to joint production agreements which also provide for distribution.

IV. Removal of additional requirements

Both Block Exemptions also now make it easier to come within their scope. The Specialization Block Exemption no longer requires companies also to have less EUR 1 billion turnover. The R&D Block Exemption no longer requires that the companies enter into a framework programme for the joint R&D.

V. Horizontal Guidelines

Where the Block Exemptions do not apply, the Horizontal Guidelines provide a systematic, economics-based framework for reviewing the relevant agreements. In each case, the analysis involves first examining the combined market shares of the parties, then individual and competitors' shares to give an overall picture of the market. In this respect, greater emphasis is placed on economic tools such as the Herfindahl-Hirshmann index (HHI) and the leading firm concentration ratio (aggregation of the market shares of leading competitors). The main focus here is to determine if market power exists. The analysis then centres on assessment of the possible competitive effects of the agreement on the market, taking into account issues such as barriers to entry and buyer power to see if an agreement will fall within Article 81(1) EC. If so, Article 81(3) EC exemption is considered to see whether the agreements show sufficient efficiency gains. However, the guidelines stress that no exemption will be available, despite any efficiencies created by the agreement, if it will result in the elimination of effective competition.

VI. Guidelines for various types of agreement

Tailor-made guidance is given for various types of agreement, all of which entail specific market concerns and/or offer specific benefits. These are: R&D agreements; production agreements (including specialization), purchasing agreements, commercialization agreements, agreements relating to standards, and environmental agreements.

In each case, the Horizontal Guidelines tackle key issues in relation to this type of agreement. For example, in relation to R&D Agreements, the Guidelines focus on competition in innovation. With production agreements, the Guidelines emphasise the likelihood of foreclosure effects because at least one of the parties has a strong market position. The possibility of vertical aspects to both purchasing agreements and commercialization agreements are stressed, as are issues such as the risk of eliminating price competition and/or exchanging confidential information. In relation to agreements on standards, the Guidelines stress the importance of transparency and the need to allow scope for market entry. Also key is the ability of competitors to choose to adopt a standard, as opposed to being forced to so do. Finally, the Guidelines offer a new framework for the examination of environmental agreements, consolidating recent Commission practice in this area.