EU Regulation

Centrum für Europäische Politik

BLOCK EXEMPTION REGULATION FOR SPECIALISATION AGREEMENTS

Status: 9 August 2010

MAIN ISSUES

Objective of the Regulation: Specialisation agreements between undertakings operating at the same market level are to become legitimate under competition law, provided the Commission expects them to boost competition.

Parties affected: Undertakings, consumers, competition authorities.

Pros: (1) Setting a clear definition of the term "potential competition" increases legal certainty.

(2) The introduction of a second market share threshold for intermediary products reduces the risk of undertakings restricting the competition related to these products.

Cons: –

CONTENT

Title

Draft [without number] of 4 May 2010 for a Commission **Regulation on the application of Article 101(3) of the Treaty of the European Union to categories of specialisation agreements**

Brief Summary

Reference: Articles quoted and Recitals refer to the Draft Regulation.

- **Background**
  - The recast version of the Block Exemption Regulation (BER) on horizontal specialisation agreements (EC) No. 2658/2000 is to replace and update the existing specialisation BER, which expires on 31 December 2010.
    - Specialisation agreements are horizontal agreements between undertakings on the specialisation requirements regarding the production of certain goods or the provision of services.
    - "Horizontal agreements" are agreements and concerted practices of undertakings operating at the same level in the value-added chain of producing or distributing goods or providing services ("products").
    - Horizontal agreements which aim at restricting competition in the EU market are in principle prohibited (Art. 101 (1) TFEU). In exceptional cases they may be exempted from this prohibition, subject to the provision that they contribute to improving the production or distribution of goods or to promoting technical or economic progress ("efficiency gains") and create benefits to consumers (Art. 101 (3) TFEU).
  - The specialisation BER's objective is to define the requirements according to which horizontal specialisation agreements may be exempted from the prohibition of agreements and practices restricting competition, as their positive effects prevail (Art. 101 (3) TFEU).

- **Exemptions of specialisation agreements**
  - An exemption of specialisation agreements from the prohibition subject to Art. 101 (1) TFEU applies if undertakings enter into co-operations regarding the production and distribution of goods in line with the criteria laid down in the Block Exemption Regulation (Art. 2 (1)).
  - Agreements which are not covered by the BER are not deemed anti-competitive per se but must be subjected to a case-by-case examination which complies with the requirements set forth under Art. 101 (3) TFEU.
  - The specialisation BER covers:
    - "unilateral specialisation agreements", under which one party agrees to fully or partly refrain from producing certain products and to purchase them from the other party (Art. 2 (1) lit. a);
    - "reciprocal specialisation agreements", under which two or more parties on a reciprocal basis agree to fully or partly refrain from producing certain but different products and to purchase them from the other parties (Art. 2 (1) lit. b) or
    - "joint production agreements", under which two or more parties agree to produce certain products jointly (Art. 2 (1) lit. c).

– The combined market share of the parties in the relevant product and geographic market may not exceed 20% for unilateral or reciprocal specialisations (Art. 3 in conjunction with Art. 5).
  - If the products concerned are intermediary products captively used for the production of downstream products, the combined market share of the parties in the market relevant for such downstream products must not exceed a maximum of 20% (Art. 1 No. 7, Recital 10).
  - If, in the course of time, the market share rises above the threshold of 20% without exceeding 25%, the exemption remains in effect for the subsequent two calendar years; if, however, it rises above 25%, it remains in effect for one calendar year only (Art. 5 (2) and (3)).

► **Hardcore restrictions**

– The exemption does not apply to "hardcore restrictions", i.e. agreements which directly or indirectly aim to:
  - fix prices when selling products to third parties (Art. 4 lit. a),
  - limit output or sales (Art. 4 lit. b) or
  - allocate markets or customer groups (Art. 4 lit. c).

► **Withdrawal of exemption**

The exemption can be withdrawn by the Commission or national competition authorities if they find that an agreement creates anti-competitive effects which are incompatible with Art. 101 (3) TFEU [Recital 13 et seq. BER Draft in conjunction with Art. 29 (1), (2) Regulation (EC) No. 1/2003].

Changes Compared to the Status Quo

- The BER introduces a second market share threshold of 20% for specialisation agreements on intermediary products and downstream production.
- The BER specifies that unilateral and reciprocal specialisations can also be exempted if a party only partly ceases production.
- The BER specifies the definition of "potential competition" which is protected both by Art. 101 (1) TFEU and the actual competition. According to this, potential competition only occurs if it seems realistic that an undertaking could carry out new investments and bear the related changeover costs within a maximum period of three years in order to enter the relevant market.

Statement on Subsidiarity by the Commission

Not applicable.

Policy Context

The Commission is planning to revise the requirements regarding horizontal agreements and block exemptions. To this end, it has presented a package containing not only the revision of the BER on specialisation agreements but also revisions of the BER for research and development agreements (R&D) [(EC) No. 2659/2000] and the horizontal guidelines [SEC(2010) 528]. These last two are to make it easier for undertakings to examine whether or not a horizontal agreement is qualified for an exemption. With regard to specialisation agreements the guidelines chapter on production agreements applies (cp. No. 144 et seq. of the Draft Guidelines). The Commission's adoption of the final versions is scheduled for the end of 2010.
The conditions regarding vertical agreements have already been revised: on 1 June 2010, the updated BER on vertical agreements in general entered into force (cp. CEP Policy Brief), as well as the revised BER on vertical agreements in the motor vehicle sector (cp. CEP Policy Brief). Both regulations are accompanied by guidelines.

Options for Influencing the Political Process

Leading Directorate General:	DG Competition

Formalities

Legal competence:	Art. 101 (3) TFEU (Competition Law)
Form of legislative competence:	Exclusive competence (Art. 3 (1) lit. b TFEU)
Legislative procedure:	Sui generis procedure (pursuant to Regulation (EEC) No. 2821/71)

ASSESSMENT

Economic Impact Assessment

Ordoliberal Assessment

Specialisation agreements can save resources and consequently **increase the efficiency of the undertakings involved**. This holds true especially for undertakings whose production techniques are characterised by high fixed costs. Thus specialisation agreements can help increase output quantity, which in turn leads to reduced costs per unit. If, as a consequence, prices fall, consumers benefit from it. To this end, it can be reasonable to exclude specialisation agreements from the prohibition of cartels under Article 101 (1) TFEU. The positive effects, however, must be confronted with the potential disadvantages of such an assumption. Thus **there is a chance that both price and quantity fixing and market allocation might significantly reduce competition** between undertakings. Moreover, there is a risk that a market-dominating position is created or strengthened. This can result in higher prices, reduced product quality and less innovation intensity or product choice and consequently harm consumers.

The Commission's general approach to defining hardcore restrictions and market share thresholds to ensure that specialisation agreements have positive effects on consumers **is appropriate**. It enables undertakings to use the advantages of specialisations without unnecessarily restricting the freedom of contract. **From an ordoliberal standpoint, no fault can be found with the hardcore restrictions**.

The definition of a market share threshold is appropriate as anti-competitive effects are all the more likely the higher the market share of the undertakings involved. The existing and future maximum **limit of 20% for market shares constitutes a reasonable compromise**.

It lies below the threshold for vertical agreements (30%) and R&D agreements (25%). The Commission's decision not to respond to demands to harmonise market share thresholds is prudent; in fact, vertical agreements are agreements between non-competing undertakings. The potential for anti-competitive implications is much lower in the case of vertical agreements than in horizontal specialisation agreements. The same applies to R&D agreements: at the point at which R&D agreements are concluded and signed it is often unclear what the demand regarding the product to be developed might look like. To this end, undertakings can hardly agree on prices or distribution activities at this early stage. The 5 percentage points higher market share threshold therefore makes sense.

Also welcome is **the planned second market share threshold for intermediary products**. It **reduces** significantly **the risk that undertakings restrict competition in areas not affected by specialisation.** Otherwise there would be the possibility that undertakings which have a dominant position in a downstream market use the cooperation for the purpose of making agreements on quality, quantity or prices in such a market.

The specialisation BER increases legal certainty. On the one hand, it stipulates that unilateral and reciprocal specialisation agreements are also exempted if a party only "partly" ceases production. On the other hand, the substantiated definition of the term "potential competition" helps undertakings when examining whether or not a specialisation agreement is covered by the prohibition of cartels under Art. 101 (1) TFEU.

Impact on Efficiency and Individual Freedom of Choice

The specialisation BER reduces economic costs since it releases numerous **undertakings from the obligation to examine agreements on a case-by-case basis** as to whether or not they are subject to exemption**.**

Impact on Growth and Employment

Insignificant.

Impact on Europe as a Business Location

Insignificant.

Legal Assessment

Legislative Competence

The specialisation BER is based on a Regulation by the Council (EEC) No. 2821/71 (Art. 1 (1) lit. c) which delegates the competence to adopt block exemptions to the Commission. The primary law for the Council Regulation is Art. 105 (3) TFEU.

Subsidiarity

As competition law is subject to the exclusive power of the EU (Art. 3 (1) lit. b TFEU), the principle of subsidiarity is not applicable here (cp. Art. 5 (3) TEC).

Proportionality

Unproblematic.

Compatibility with EU Law

Unproblematic. The Commission has complied with the procedure prescribed by the Council under Art. 5 and 6 of the Regulation (EEC) 2821/7. It provides in particular that before adopting a regulation it must first consult the Advisory Committee on Restrictive Practices and give all interested parties (individuals or organisations) the opportunity to issue a statement on the subject.

Compatibility with German Law

The German provision on "exempted agreements" under the Law against Restraint of Competition (§ 2 (2) GWB) refers directly to European BERs so that its exemption requirements apply to purely German agreements too.

Conclusion

Both the hardcore restrictions as well as the market share threshold of 20% are appropriate. It is to be welcomed that the BER introduces a second market share threshold for intermediary products. This reduces the risk that undertakings restrict competition in economic fields that are not affected by specialisation. The BER increases legal certainty and reduces economic costs, since it releases undertakings from the obligation to examine agreements on a case-by-case basis.