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EUROPEAN COMMISSION

Brussels, xxx
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Draft

COMMISSION REGULATION (EU) No .../..

of [...]

on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of specialisation agreements

(Text with EEA relevance)

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on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of specialisation agreements

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EEC) No 2821/71 of 20 December 1971 on application of Article 85(3) of the Treaty to categories of agreements, decisions and concerted practices¹, as last amended by Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty², and in particular Article 40 thereof,

Having published a draft of this Regulation,

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

- (1) Regulation (EEC) No 2821/71 empowers the Commission to apply Article 101(3) of the Treaty (formerly Article 81(3), and, previously, Article 85(3) of the EC Treaty) by regulation to certain categories of agreements, decisions and concerted practices falling within the scope of Article 101(1) of the Treaty which have as their object specialisation, including agreements necessary for achieving it.
- (2) Pursuant to Regulation (EEC) No 2821/71, in particular, the Commission has adopted Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements³. Regulation (EC) No 2658/2000 expires on 31 December 2010.
- (3) A new regulation should meet the two requirements of ensuring effective protection of competition and providing adequate legal security for undertakings. The pursuit of these objectives should take account of the need to simplify administrative supervision and the legislative framework to as great an extent as possible. Below a certain level of market power it can, for the application of Article 101(3) of the Treaty, in general be

¹ OJ L 285, 29.12.1971, p. 46.

² OJ L 1, 4.1.2003, p. 1.

³ OJ L 304, 5.12.2000, p. 3.

presumed that the positive effects of specialisation agreements will outweigh any negative effects on competition.

- (4) For the application of Article 101(3) of the Treaty by regulation, it is not necessary to define those agreements which are capable of falling within Article 101(1) of the Treaty. In the individual assessment of agreements under Article 101(1) of the Treaty, account has to be taken of several factors, and in particular the market structure on the relevant market.
- (5) The benefit of the block exemption should be limited to those agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty.
- (6) Agreements on specialisation in production are most likely to contribute to improving the production or distribution of goods if the parties have complementary skills, assets or activities, because they can concentrate on the manufacture of certain products and thus operate more efficiently and supply the products more cheaply. The same can generally be said about agreements on specialisation in the preparation of services. Given effective competition, it is likely that consumers will receive a fair share of the resulting benefits.
- (7) Such advantages can arise equally from agreements whereby one party fully or partly gives up the manufacture of certain products or preparation of certain services in favour of another party («unilateral specialisation»), from agreements whereby each party fully or partly gives up the manufacture of certain products or preparation of certain services in favour of another party («reciprocal specialisation») and from agreements whereby the parties undertake to jointly manufacture certain products or prepare certain services («joint production»).
- (8) The application of the present Regulation to unilateral and reciprocal specialisation agreements should be limited to agreements between parties active on the same product market(s). Joint production agreements should fall within the scope of this Regulation irrespective of whether the parties are already active in the same product market(s). The block exemption should also apply to provisions contained in specialisation agreements which relate to the assignment or licensing of intellectual property rights to one or more of the parties, provided that those provisions do not constitute the primary object of such agreements but are directly related to and necessary for their implementation, and to certain related purchasing and marketing arrangements.
- (9) To ensure that the benefits of specialisation will materialise without one party fully leaving the market downstream of production, unilateral and reciprocal specialisation agreements should only be covered by this Regulation where they provide for supply and purchase obligations or joint distribution. Supply and purchase obligations may, but do not have to, be of an exclusive nature.
- (10) It can be presumed that, where the parties' share of the relevant market for the products which are the subject matter of a specialisation agreement as defined in this Regulation does not exceed 20 %, such agreements will, as a general rule, give rise to economic benefits in the form of economies of scale or scope or better production technologies, while allowing consumers a fair share of the resulting benefits. However, in case the

products which are the subject matter of a specialisation agreement are intermediary products which one or more of the parties fully or partly use captively for the production of downstream products which are sold by these parties on the merchant market, in addition, the parties' share on the relevant merchant market for these downstream products should not exceed 20% either in order to avoid the risk of input foreclosure. There is, however, no presumption that specialisation agreements are either caught by Article 101(1) of the Treaty or that they fail to satisfy the conditions of Article 101(3) of the Treaty once the market share threshold set out in this Regulation is exceeded. In such a case an individual assessment of the specialisation agreement needs to be conducted under Article 101 of the Treaty.

- (11) This Regulation should not exempt agreements containing restrictions which are not indispensable to attain the positive effects mentioned above. In principle, certain severe restrictions of competition relating to the fixing of prices charged to third parties, limitation of output or sales, and allocation of markets or customers should be excluded from the benefit of the block exemption established by this Regulation irrespective of the market share of the parties.
- (12) The market share threshold, the non-exemption of certain agreements and the conditions provided for in this Regulation normally ensure that the agreements to which the block exemption applies do not enable the parties to eliminate competition in respect of a substantial part of the products or services in question.
- (13) The Commission may withdraw the benefit of this Regulation, pursuant to Article 29(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, where it finds in a particular case that an agreement to which the exemption provided for in Article 2 applies nevertheless has effects which are incompatible with Article 101(3) of the Treaty. This may occur, for example where the relevant market(s) is very concentrated and competition is already weak, in particular because of the individual market positions of other market participants or links between other market participants created by parallel specialisation agreements.
- (14) Council Regulation (EC) No 1/2003 empowers in its Article 29(2) the competition authority of a Member State to withdraw the benefit of this Regulation for its territory or a part thereof where it finds in a particular case that an agreement to which the exemption provided for in Article 2 applies nevertheless has effects which are incompatible with Article 101(3) of the Treaty in the territory of that Member State, or in a part thereof, and where such territory has all the characteristics of a distinct geographic market.
- (15) In order to facilitate the conclusion of specialisation agreements, which can have a bearing on the structure of the participating undertakings, the period of validity of this Regulation should be fixed at 12 years.
- (16) This Regulation is without prejudice to the application of Article 102 of the Treaty,

HAS ADOPTED THIS REGULATION:

Article 1

Definitions

For the purposes of this Regulation:

1. «Agreement» means an agreement, a decision of an association of undertakings or a concerted practice.
2. «Parties» means undertakings party to the agreement and their respective connected undertakings.
3. «Connected undertakings» means:
 - (a) undertakings in which a party to the agreement, directly or indirectly:
 - (i) has the power to exercise more than half the voting rights;
 - (ii) has the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking; or
 - (iii) has the right to manage the undertaking's affairs;
 - (b) undertakings which directly or indirectly have, over a party to the agreement, the rights or powers listed in (a);
 - (c) undertakings in which an undertaking referred to in (b) has, directly or indirectly, the rights or powers listed in (a);
 - (d) undertakings in which a party to the agreement together with one or more of the undertakings referred to in (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in (a);
 - (e) undertakings in which the rights or the powers listed in (a) are jointly held by:
 - (i) parties to the agreement or their respective connected undertakings referred to in (a) to (d); or
 - (ii) one or more of the parties to the agreement or one or more of their connected undertakings referred to in (a) to (d) and one or more third parties.
4. «Product» means a good and/or a service, including both intermediary goods and/or services and final goods and/or services, with the exception of distribution and rental services.
5. «Production» means the manufacture of goods or the preparation of services and includes production by way of subcontracting.

6. «Preparation of services» means activities upstream of the provision of services to customers.
7. «Relevant market» means the relevant product and geographic market(s) to which the specialisation products belong, and, in addition, in case the specialisation products are intermediary products which one or more of the parties fully or partly use captively for the production of downstream products, the relevant product and geographic market(s) to which the downstream products belong.
8. «Specialisation products» means the products which are the subject matter of a specialisation agreement.
9. «Downstream products» means the products for which the specialisation products are used by one or more of the parties as an input and which are sold by these parties on the merchant market.
10. «Competing undertaking» means an actual or potential competitor.
11. «Actual competitor» means an undertaking that is active on the same relevant market.
12. «Potential competitor» means an undertaking that would, on realistic grounds and not just as a mere theoretical possibility, in case of a small but permanent increase in relative prices be likely to undertake, within not more than three years, the necessary additional investments or other necessary switching costs to enter the relevant market.
13. «Exclusive supply obligation» means an obligation not to supply a competing undertaking other than a party to the agreement with the product to which the specialisation agreement relates.
14. «Exclusive purchase obligation» means an obligation to purchase the product to which the specialisation agreement relates only from the party which agrees to supply it.
15. Distribution is carried out «jointly» where the parties:
 - (a) carry out the distribution of the products by way of a joint team, organisation or undertaking; or
 - (b) appoint a third party distributor on an exclusive or non-exclusive basis, provided that the third party is not a competing undertaking.
16. «Distribution» includes the provision of services.

Article 2

Exemption

1. Pursuant to Article 101(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 101(1) of the Treaty shall not apply to

the following agreements entered into between two or more parties which relate to the conditions under which those parties specialise in the production of products (hereinafter referred to as «specialisation agreements»):

- (a) unilateral specialisation agreements between two parties which are active on the same product market(s), by virtue of which one party agrees to fully or partly cease production of certain products or to refrain from producing those products and to purchase them from the other party, who agrees to produce and supply those products; or
- (b) reciprocal specialisation agreements between two or more parties which are active on the same product market(s), by virtue of which two or more parties on a reciprocal basis agree to fully or partly cease or refrain from producing certain but different products and to purchase these products from the other parties, who agree to produce and supply them; or
- (c) joint production agreements, by virtue of which two or more parties agree to produce certain products jointly.

This exemption shall apply to the extent that such specialisation agreements contain restrictions of competition falling within the scope of Article 101(1) of the Treaty.

- 2. The exemption provided for in paragraph 1 shall also apply to specialisation agreements containing provisions which relate to the assignment or licensing of intellectual property rights to one or more of the parties, provided that those provisions do not constitute the primary object of such agreements, but are directly related to and necessary for their implementation.
- 3. The exemption provided for in paragraph 1 shall also apply where:
 - (a) the parties accept an exclusive purchase and/or exclusive supply obligation in the context of a specialisation agreement; or
 - (b) the parties do not sell the products which are the object of the specialisation agreement independently but provide for joint distribution.

Article 3

Market share threshold

The exemption provided for in Article 2 shall apply on condition that the combined market share of the parties does not exceed 20 % on any relevant market.

Article 4

Hardcore restrictions

The exemption provided for in Article 2 shall not apply to agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

- (a) the fixing of prices when selling the products to third parties with the exception of the fixing of prices charged to immediate customers in the context of joint distribution;
- (b) the limitation of output or sales with the exception of:
 - provisions on the agreed amount of products in the context of unilateral or reciprocal specialisation agreements or the setting of the capacity and production volume in the context of a joint production agreement; and
 - the setting of sales targets in the context of joint distribution; or
- (c) the allocation of markets or customers.

Article 5

Application of the market share threshold

1. For the purposes of applying the market share threshold provided for in Article 3 the following rules shall apply:
 - (a) the market share shall be calculated on the basis of the market sales value; if market sales value data are not available, estimates based on other reliable market information, including market sales volumes, may be used to establish the market share of the parties;
 - (b) the market share shall be calculated on the basis of data relating to the preceding calendar year;
 - (c) the market share held by the undertakings referred to in point 3(e) of Article 1 shall be apportioned equally to each undertaking having the rights or the powers listed in point 3(a) of Article 1.
2. If the market share referred to in Article 3 is initially not more than 20 % but subsequently rises above this level without exceeding 25 %, the exemption provided for in Article 2 shall continue to apply for a period of two consecutive calendar years following the year in which the 20 % threshold was first exceeded.
3. If the market share referred to in Article 3 is initially not more than 20 % but subsequently rises above 25 %, the exemption provided for in Article 2 shall continue to apply for one calendar year following the year in which the level of 25 % was first exceeded.
4. The benefit of paragraphs 2 and 3 may not be combined so as to exceed a period of two calendar years.

Article 6

Transitional period

The prohibition laid down in Article 101(1) of the Treaty shall not apply during the period from 1 January 2011 to 31 December 2011 in respect of agreements already in force on 31 December 2010 which do not satisfy the conditions for exemption provided for in this Regulation but which satisfy the conditions for exemption provided for in Regulation (EC) No 2658/2000.

Article 7

Period of validity

This Regulation shall enter into force on [...] 2011.

It shall expire on 31 December 2022.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, [...].

For the Commission
The President
José Manuel BARROSO