

Deutsche Vereinigung
für gewerblichen Rechtsschutz
und Urheberrecht e.V.

Deutsche Vereinigung für gewerblichen Rechtsschutz und Urheberrecht
Theodor-Heuss-Ring 19-21 • 50668 Köln

European Commission
General Direction Competition
General Director Dr. Alexander Schaub
Avenue de Cortenberg 150

B-1049 Brussels

Sitz Berlin
Hauptgeschäftsstelle Köln

50668 Köln, den **26.05.2000**
Theodor-Heuss-Ring 19-21
Telefon (0221) 77 16-151
Telefax (0221) 77 16-205
e-mail: office@grur.de

Ihr Zeichen:

Unser Zeichen: **Loew/ks**
(Bei der Antwort bitte angeben)

Provisional opinion of the Deutsche Vereinigung für gewerblichen Rechtsschutz und Urheberrecht e.V. (German Association for Industrial Property and Copyright Law) on the draft proposals for

- **an ordinance for application on Article 81 Paragraph 3 EU Treaty on groups of specialization agreements;**
- **an ordinance for application on Article 81 Paragraph 3 EU Treaty on groups of agreements on research and development;**
- **guidelines for the applicability of Article 81 of the EU Treaty on agreements concerning horizontal cooperation.**

Dear General Director,

The Deutsche Vereinigung für gewerblichen Rechtsschutz und Urheberrecht e.V. (German Association for Industrial Property and Copyright Law) is a recognized non-profit-making scientific association for all those practitioners and scientists involved in the area of industrial property and copyright law, including competition law. Under the terms of its statutes, it seeks to promote the scientific development of industrial property law and to support the legislative organs as well as the responsible ministries and institutions on questions of intellectual property.

The association welcomes the plans of the Commission to supplement the existing practice with respect to agreements on horizontal cooperation with new regulations which should take into account current developments and provide the companies with a better assessment as to how specific market behaviour is to be judged from the point of view of competition law.

It must, however, be pointed out that it is impossible to prepare a well-founded opinion within the period of one month set by the Commission. A meeting of the responsible committee for cartel law of our association must be convened which, in the interest of a high level of attendance of our members, cannot be arranged at extremely short notice. The draft proposals of the commission must be discussed in detail within the committee, and subsequently an opinion prepared by an editorial committee. As the members of the committee are all extremely busy lawyers, company legal advisers, university lecturers, judges and members of the relevant ministries and public authorities, a few weeks are simply insufficient for this work. That applies especially to the case in question, as it is necessary to develop an opinion on three extensive draft proposals of considerable legal and economic consequence.

In order to comply with the deadline for the planned hearing, the German Association is submitting a provisional opinion. It reserves the right, however, to supplement this opinion following the detailed consideration of the draft proposals which is still necessary.

A. On the draft proposal for an ordinance for the application of Article 81 Paragraph 3 EU Treaty on groups of agreements on research and development

1. Re. Art. 1

The German Association welcomes the clarification on Art. 1 Par. 2, that necessary supplementary agreements are also subject to exemption. It should, however, be considered whether the terms “necessary” and “direct” could not also be dispensed with. In practice, these terms are subject to considerable interpretation problems and probably lead to avoidable legal uncertainty.

2. Re. Art 3

A problem continues to exist in the fact that the exemption can only be granted for a period of five years. This period of exploitation is not sufficient in order to be able to amortize the necessary investments. The Commission recognizes the necessity for a longer period of exemption for the exploitation phase in text item 69 of the guidelines, however, only in connection with an individual exemption process. The problem will also not be completely solved through Art. 3 Par. 3, because in the form of an ex ante observation, the companies cannot be certain, especially in the case of innovative products, that after five years there are so many other suppliers that together they will hold a market share of 75% or more. The German Association proposes here that the exemption period be extended, if possible to between seven and ten years.

The raising of the market share threshold from 20% to 25% is to be welcomed. In this connection, we must be aware of the fact that there will continue to be difficult problems in the determination of the materially and geographically relevant market.

There are reservations, in contrast, that in Art. 3 Par 3, with the term “rival manufacturers” now the potential competition will also be included. According to the currently valid law, Article 3 addresses itself to agreements between companies which are “not in competition with each other as manufacturers”; according to general interpretation, this only refers to current competitive relations. In practice, it is often impossible to determine with sufficient clarity when potential competition exists. Thus, an unnecessary legal uncertainty is introduced into the ordinance.

3. Re. Art. 5

The German Association assumes that now the all or nothing principle will cease to be valid, but rather that only the individual clause indicated in Art. 5 Par 1 is inoperative, insofar as it infringes Art. 81 Par. EGV. It should be considered whether this should not be expressed more clearly, possibly in the grounds.

In Art. 5 Par 1 lit. b (Non-aggression clause) ,it could be made clear in connection with the technology transfer GVO, that exercising of a right to terminate after an attack on the industrial property rights is unobjectionable.

Serious reservations must be raised against Art. 5 Par 1 lit. h. The possibility of revocation called for in Art 7 (c) should be sufficient in order to achieve the objective pursued by Art. 5 Par. 1 lit. h. The ruling planned there appears, by comparison, to have too little flexibility, especially as it does contain the precondition “without factually justified grounds” contained in Art. 7 (c).

B. On the draft proposal for an ordinance for the application of Article 81 Paragraph 3 EU Treaty on groups of specialization agreements

1. Re. Art 1

It is to be welcomed that, in contrast to the regulation which is currently valid, the cases of unilateral specialization will be integrated into the GVO

Re. Art 1 Par. 2 (supplementary agreements), reference is made to the relevant comments on the R&D GVO.

2. Re. Art 2

From the practical point of view, it represents a significant deterioration in the legal situation, if in Art 2 (b) “rival companies in the relevant market” are excluded as third sales companies, and, according to the definition in Art. 5 No. 6, the concept of rival companies also includes potential competitors. Almost any company that is interested in marketing the products in question can be a potential competitor. The valid regulation which addresses itself to contract partners who, “neither manufacture nor distribute products of a third manufacturer which are in competition with the contract products”, is simply to handle and is probably adequate from the point of view of competition law. In addition, the term potential competition leads to considerable problems of interpretation, to which reference was already made in the opinion on the R&D GVO (there under item 2).

3. Re. Art. 3

With reference to the market share threshold, the question arises as to why not here – as in the R&D GVO – a market share of 25% should not be considered.

4. Re. Art. 4

Here again – as in the R&D GVO – it should be considered whether it should be made clearer that the all or nothing principle no longer applies.

C. On the draft proposal on guidelines for the applicability of Article 81 of the EU Treaty on agreements about horizontal cooperation

With respect to the guidelines on agreements about horizontal cooperation, in view of its scale, the many legal and economic questions associated with it, and their far-reaching significance, it was impossible, within the set deadline, to prepare an opinion which took into account the numerous aspects of the guidelines.

In principle, the German Association welcomes the fact that the Commission – as with the vertical agreements – also wishes to issue guidelines for horizontal agreements which should make it possible for the companies to estimate the assessment of such agreements by the Commission in terms of competition law. An initial reading of the text revealed, however, that such an assessment will be made difficult by the use of numerous indefinite terms which leave substantial scope for their interpretation, and which will probably lead to a not inconsiderable legal uncertainty for those concerned. Even though it cannot be denied that the analytical framework based on economic criteria chosen by the Commission often does not permit a precise definition. A greater degree of clarity could have been achieved at various points. That applies particularly to the use of terms which are not customary in the application of the law and are not explained in detail, which practically escape legal subsumption. As examples, reference is made to the term “weak market position” (text item 28) or the term “credible competitor” (text item 50). In the supplementary opinion of the German Association already mentioned, reference will be made to further cases.

An opinion will also have to be given on a whole series of points in connection with the individual material questions, on the basic principles of the evaluation as well as to their

application to the individual forms of cooperation examined in the guidelines, the criteria thus applied and the results produced.

As an example, reference is made to text item 106 ff (Purchasing agreements). Purchasing agreements have not played a major role in the previous judgement practices of the Commission. There are only few official decisions and, in the discussion of contract projects, in many cases a marked legal uncertainty is to be felt. It is, therefore, to be welcomed that the Commission's position is to be clarified in the guidelines.

If we consider the competition policy premise that companies should not be driven into mergers as a result of the too restrictive principles applied in the handling of cooperations, the statements of the Commission on this theme should be regarded positively. The Commission recognizes that agreements between small and medium-sized companies are normally conducive to competition (text item 107) and that Article 81 Par 1, with respect to a cooperation in purchasing markets "only seldom will be applicable, unless the contract partners possess a powerful position on the purchasing markets" (text item 114).

Too cautious, on the other hand, is the statement in text item 116, according to which, purchasing agreements "only then" undoubtedly are subject to Article 81 Par. 1, if the agreement clearly does not serve joint procurement, but rather is used as a means to conceal a cartel. Correct, on the other hand, is that purchasing agreements must be investigated in their legal and economic environment and that the investigation must cover the purchasing and selling markets (text item 117).

Conversely, the conjecture of the Commission in text item 120 on the risks of joint purchasing go too far. This is also so because it remains unclear, when buyers exercise power in the selling markets "together". If the selling markets are marked by intense competition, the cost savings will be passed on to the customers. A higher market share of the cooperation partners in the selling markets must not rule this out, in other words. In particular, it is not automatic that a high market share in the selling markets will form an incentive for the sellers to mutually coordinate their behaviour. The price cartels, which have become evident in recent times, were not based on the fact that the partners also practised joint purchasing. Finally, cases in which a "high proportion of the overall costs" are balanced through joint purchasing are probably rare. The Commission

concerns itself here in its examples largely with trade companies, not however with industrial companies, in which the situation is completely different.

The final sentence in text item 124 could be a problem. Buying cooperations are regularly agreed in order to save costs via lower purchasing prices. If the competition in the sales markets functions, they will also produce advantages for the customer. If one understands the word “and” thus, the statement is correct. Cooperations for the purpose of achieving more favourable purchasing prices should, however, not be generally excluded from exemption.

Reference is also made here to text item 131 ff. (Marketing agreements). In text item 150, it is stated that agreements concerning the fixing of prices independent of the market power of the contract partners is subject to Art. 81 Par 1 “without exception”. This contradicts the jurisdiction of the European Court of Justice (e.g. Völk/Verwaecke). In the case of lack of perceptibility, even hardcore rulings can be unobjectionable.

The comments on joint marketing are also marked by exaggerated caution. The Commission already sees an important threshold at a market share threshold of only 15%, namely already for cases which do not extend to price fixing. In this connection, attention should be drawn once again to the fact that according to EG-FKVO, all mergers with an accumulated market share of up to 25% essentially imply an assumption of being unobjectionable. It would not be a fortunate competition policy solution, if the Commission were to deny companies willing to work together the right to cooperate (including joint marketing), and thus force them into a (partial) merger. It must be agreed with the Commission that via this detour, no concealed price cartels may be legalized. In practice, however, the facts of the matter are usually much more complex, and the Commission should here accept a more appropriate, in other words, graduated permissibility also of sales cooperations (including price fixing).

On other points, the discussions in the Committee for Cartel Law have not yet been completed. They will be referred to in a supplementary opinion which will be submitted as soon as possible.

Dr. Gloy
President

Dr. Loschelder
Secretary-General