

COMMISSION NOTICE

Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements

(2001/C 3/02)

(Text with EEA relevance)

1. INTRODUCTION**1.1. Purpose**

1. These guidelines set out the principles for the assessment of horizontal cooperation agreements under Article 81 of the Treaty. A cooperation is of a 'horizontal nature' if an agreement or concerted practice is entered into between companies operating at the same level(s) in the market. In most instances, horizontal cooperation amounts to cooperation between competitors. It covers for example areas such as research and development (R & D), production, purchasing or commercialisation.
2. Horizontal cooperation may lead to competition problems. This is for example the case if the parties to a cooperation agree to fix prices or output, to share markets, or if the cooperation enables the parties to maintain, gain or increase market power and thereby causes negative market effects with respect to prices, output, innovation or the variety and quality of products.
3. On the other hand, horizontal cooperation can lead to substantial economic benefits. Companies need to respond to increasing competitive pressure and a changing market place driven by globalisation, the speed of technological progress and the generally more dynamic nature of markets. Cooperation can be a means to share risk, save costs, pool know-how and launch innovation faster. In particular for small and medium-sized enterprises cooperation is an important means to adapt to the changing market place.
4. The Commission, while recognising the economic benefits that can be generated by cooperation, has to ensure that effective competition is maintained. Article 81 provides the legal framework for a balanced assessment taking into account both anti-competitive effects as well as economic benefits.
5. In the past, two Commission notices and two block exemption regulations provided guidance for the assessment of horizontal cooperation under Article 81. Commission Regulation (EEC) No 417/85⁽¹⁾, as last amended by Regulation (EC) No 2236/97⁽²⁾ and Commission Regulation (EEC) No 418/85⁽³⁾, as last amended by Regulation (EC) No 2236/97, provided for the exemption of certain forms of specialisation agreement and research and development agreement (R & D) respectively. Those two Regulations have now been replaced by Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements⁽⁴⁾ (the Specialisation block exemption Regulation) and Commission Regulation (EC) No 2659/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements⁽⁵⁾ (the R & D block exemption Regulation). The two notices provided guidance in respect of certain types of cooperation agreement falling outside Article 81⁽⁶⁾ and the assessment of cooperative joint ventures⁽⁷⁾.
6. Changing markets have generated an increasing variety and use of horizontal cooperation. More complete and updated guidance is needed to improve clarity and transparency regarding the applicability of Article 81 in this area. Within the assessment greater emphasis has to be put on economic criteria to better reflect recent developments in enforcement practice and the case law of the Court of Justice and Court of First Instance of the European Communities.
7. The purpose of these guidelines is to provide an analytical framework for the most common types of horizontal cooperation. This framework is primarily based on criteria that help to analyse the economic context of a cooperation agreement. Economic criteria such as the market power of the parties and other factors relating to the market structure, form a key element of the assessment of the market impact likely to be caused by a cooperation and therefore for the assessment under Article 81. Given the enormous variety in types and combinations of horizontal cooperation and market circumstances in which they operate, it is impossible to provide specific answers for every possible scenario. The present analytical framework based on economic criteria will nevertheless assist businesses in assessing the compatibility of an individual cooperation agreement with Article 81.
8. The guidelines not only replace the Notices referred to in paragraph 5, but also cover a wider range of the most common types of horizontal agreements. They complement the R & D block exemption Regulation and the Specialisation block exemption Regulation.

177. Example 2

Situation: A number of videocassette manufacturers agree to develop a quality mark or standard to denote the fact that the videocassette meets certain minimum technical specifications. The manufacturers are free to produce videocassettes which do not conform to the standard and the standard is freely available to other developers.

Analysis: Provided that the agreement does not otherwise restrict competition, Article 81(1) is not infringed, as participation in standard setting is unrestricted and transparent, and the standardisation agreement does not set an obligation to comply with the standard. If the parties agreed only to produce videocassettes which conform to the new standard, the agreement would limit technical development and prevent the parties from selling different products, which would infringe Article 81(1).

178. Example 3

Situation: A group of competitors active in various markets which are interdependent with products that must be compatible, and with over 80 % of the relevant markets, agree to jointly develop a new standard that will be introduced in competition with other standards already present in the market, widely applied by their competitors. The various products complying with the new standard will not be compatible with existing standards. Because of the significant investment needed to shift and to maintain production under the new standard, the parties agree to commit a certain volume of sales to products complying with the new standard so as to create a 'critical mass' in the market. They also agree to limit their individual production volume of products not complying with the standard to the level attained last year.

Analysis: This agreement, owing to the parties' market power and the restrictions on production, falls under Article 81(1) while not being likely to fulfil the conditions of paragraph 3, unless access to technical information were provided on a non-discriminatory basis and reasonable terms to other suppliers wishing to compete.

7. ENVIRONMENTAL AGREEMENTS

7.1. Definition

179. Environmental agreements⁽⁵⁰⁾ are those by which the parties undertake to achieve pollution abatement, as defined in environmental law, or environmental

objectives, in particular, those set out in Article 174 of the Treaty. Therefore, the target or the measures agreed need to be directly linked to the reduction of a pollutant or a type of waste identified as such in relevant regulations⁽⁵¹⁾. This excludes agreements that trigger pollution abatement as a by-product of other measures.

180. Environmental agreements may set out standards on the environmental performance of products (inputs or outputs) or production processes⁽⁵²⁾. Other possible categories may include agreements at the same level of trade, whereby the parties provide for the common attainment of an environmental target such as recycling of certain materials, emission reductions, or the improvement of energy-efficiency.

181. Comprehensive, industry-wide schemes are set up in many Member States for complying with environmental obligations on take-back or recycling. Such schemes usually comprise a complex set of arrangements, some of which are horizontal, while others are vertical in character. To the extent that these arrangements contain vertical restraints they are not subject to these guidelines.

7.2. Relevant markets

182. The effects are to be assessed on the markets to which the agreement relates, which will be defined according to the Notice on the definition of the relevant market for the purposes of Community competition law. When the pollutant is not itself a product, the relevant market encompasses that of the product into which the pollutant is incorporated. As for collection/recycling agreements, in addition to their effects on the market(s) on which the parties are active as producers or distributors, the effects on the market of collection services potentially covering the good in question must be assessed as well.

7.3. Assessment under Article 81(1)

183. Some environmental agreements may be encouraged or made necessary by State authorities in the exercise of their public prerogatives. The present guidelines do not deal with the question of whether such State intervention is in conformity with the Member State's obligations under the Treaty. They only address the assessment that must be made as to the compatibility of the agreement with Article 81.

7.3.1. Nature of the agreement

7.3.1.1. Agreements that do not fall under Article 81(1)

184. Some environmental agreements are not likely to fall within the scope of the prohibition of Article 81(1), irrespective of the aggregated market share of the parties.

185. This may arise if no precise individual obligation is placed upon the parties or if they are loosely committed to contributing to the attainment of a sector-wide environmental target. In this latter case, the assessment will focus on the discretion left to the parties as to the means that are technically and economically available in order to attain the environmental objective agreed upon. The more varied such means, the less appreciable the potential restrictive effects.

186. Similarly, agreements setting the environmental performance of products or processes that do not appreciably affect product and production diversity in the relevant market or whose importance is marginal for influencing purchase decisions do not fall under Article 81(1). Where some categories of a product are banned or phased out from the market, restrictions cannot be deemed appreciable in so far as their share is minor in the relevant geographic market or, in the case of Community-wide markets, in all Member States.

187. Finally, agreements which give rise to genuine market creation, for instance recycling agreements, will not generally restrict competition, provided that and for as long as, the parties would not be capable of conducting the activities in isolation, whilst other alternatives and/or competitors do not exist.

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

188. Environmental agreements come under Article 81(1) by their nature if the cooperation does not truly concern environmental objectives, but serves as a tool to engage in a disguised cartel, i.e. otherwise prohibited price fixing, output limitation or market allocation, or if the cooperation is used as a means amongst other parts of a broader restrictive agreement which aims at excluding actual or potential competitors.

7.3.1.3. Agreements that may fall under Article 81(1)

189. Environmental agreements covering a major share of an industry at national or EC level are likely to be caught by Article 81(1) where they appreciably restrict the parties' ability to devise the characteristics of their products or the way in which they produce them, thereby granting them influence over each other's production or sales. In addition to restrictions between the parties, an environmental agreement may also reduce or substantially affect the output of third parties, either as suppliers or as purchasers.

190. For instance, environmental agreements, which may phase out or significantly affect an important proportion of the parties' sales as regards their products or production processes, may fall under Article 81(1) when the parties hold a significant proportion of the market. The same applies to agreements whereby the parties allocate individual pollution quotas.

191. Similarly, agreements whereby parties holding significant market shares in a substantial part of the common market appoint an undertaking as exclusive provider of collection and/or recycling services for their products, may also appreciably restrict competition, provided other actual or realistic potential providers exist.

7.4. Assessment under Article 81(3)

7.4.1. Economic benefits

192. The Commission takes a positive stance on the use of environmental agreements as a policy instrument to achieve the goals enshrined in Article 2 and Article 174 of the Treaty as well as in Community environmental action plans⁽⁵³⁾, provided such agreements are compatible with competition rules⁽⁵⁴⁾.

193. Environmental agreements caught by Article 81(1) may attain economic benefits which, either at individual or aggregate consumer level, outweigh their negative effects on competition. To fulfil this condition, there must be net benefits in terms of reduced environmental pressure resulting from the agreement, as compared to a baseline where no action is taken. In other words, the expected economic benefits must outweigh the costs⁽⁵⁵⁾.

194. Such costs include the effects of lessened competition along with compliance costs for economic operators and/or effects on third parties. The benefits might be assessed in two stages. Where consumers individually have a positive rate of return from the agreement under reasonable payback periods, there is no need for the aggregate environmental benefits to be objectively established. Otherwise, a cost-benefit analysis may be necessary to assess whether net benefits for consumers in general are likely under reasonable assumptions.

7.4.2. Indispensability

195. The more objectively the economic efficiency of an environmental agreement is demonstrated, the more clearly each provision might be deemed indispensable to the attainment of the environmental goal within its economic context.

196. An objective evaluation of provisions which might 'prima facie' be deemed not to be indispensable must be supported with a cost-effectiveness analysis showing that alternative means of attaining the expected environmental benefits, would be more economically or financially costly, under reasonable assumptions. For instance, it should be very clearly demonstrated that a uniform fee, charged irrespective of individual costs for waste collection, is indispensable for the functioning of an industry-wide collection system.

7.4.3. No elimination of competition

197. Whatever the environmental and economic gains and the necessity of the intended provisions, the agreement must not eliminate competition in terms of product or process differentiation, technological innovation or market entry in the short or, where relevant, medium run. For instance, in the case of exclusive collection rights granted to a collection/recycling operator who has potential competitors, the duration of such rights should take into account the possible emergence of an alternative to the operator.

7.5. Examples

198. Example

Situation: Almost all Community producers and importers of a given domestic appliance (e.g. washing machines) agree, with the encouragement of a public body, to no longer manufacture and import into the Community products which do not comply with certain environmental criteria (e.g. energy efficiency). Together, the parties hold

90 % of the Community market. The products which will be thus phased out of the market account for a significant proportion of total sales. They will be replaced with more environmentally friendly, but also more expensive products. Furthermore, the agreement indirectly reduces the output of third parties (e.g. electric utilities, suppliers of components incorporated in the products phased out).

Analysis: The agreement grants the parties control of individual production and imports and concerns an appreciable proportion of their sales and total output, whilst also reducing third parties' output. Consumer choice, which is partly focused on the environmental characteristics of the product, is reduced and prices will probably rise. Therefore, the agreement is caught by Article 81(1). The involvement of the public authority is irrelevant for this assessment.

However, newer products are more technically advanced and by reducing the environmental problem indirectly aimed at (emissions from electricity generation), they will not inevitably create or increase another environmental problem (e.g. water consumption, detergent use). The net contribution to the improvement of the environmental situation overall outweighs increased costs. Furthermore, individual purchasers of more expensive products will also rapidly recoup the cost increase as the more environmentally friendly products have lower running costs. Other alternatives to the agreement are shown to be less certain and less cost-effective in delivering the same net benefits. Varied technical means are economically available to the parties in order to manufacture products which do comply with the environmental characteristics agreed upon and competition will still take place for other product characteristics. Therefore, the conditions for an exemption under Article 81(3) are fulfilled.