This document is meant purely as a documentation tool and the institutions do not assume any liability for its contents

►**B**

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

(Text with EEA relevance)

(OJ L 304, 5.12.2000, p. 3)

Amended by:

		Official Journal		
		No	page	date
►**A1**	Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded	L 236	33	23.9.2003

▼B

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

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 2821/71 of 20 December 1971 on the application of Article 85(3) of the Treaty to categories of agreements, decisions and concerted practices [1], as last amended by the Act of Accession of Austria, Finland and Sweden, and in particular Article 1(1)(c) thereof,

Having published a draft of this Regulation [2],

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

Whereas:

(1) Regulation (EEC) No 2821/71 empowers the Commission to apply Article 81(3) (formerly Article 85(3)) of the Treaty by regulation to certain categories of agreements, decisions and concerted practices falling within the scope of Article 81(1) 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 (EEC) No 417/85 of 19 December 1984 on the application of Article 85(3) of the Treaty to categories of specialisation agreements [3], as last amended by Regulation (EC) No 2236/97 [4]. Regulation (EEC) No 417/85 expires on 31 December 2000.

(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 81(3), in general be presumed that the positive effects of specialisation agreements will outweigh any negative effects on competition.

(4) Regulation (EEC) No 2821/71 requires the exempting regulation of the Commission to define the categories of agreements, decisions and concerted practices to which it applies, to specify the restrictions or clauses which may, or may not, appear in the agreements, decisions and concerted practices, and to specify the clauses which must be contained in the agreements, decisions and concerted practices or the other conditions which must be satisfied.

(5) It is appropriate to move away from the approach of listing exempted clauses and to place greater emphasis on defining the categories of agreements which are exempted up to a certain level of market power and on specifying the restrictions or clauses which are not to be contained in such agreements. This is consistent with an economics-based approach which assesses the impact of agreements on the relevant market.

(6) For the application of Article 81(3) by regulation, it is not necessary to define those agreements which are capable of falling

---

[1] OJ L 285, 29.12.1971, p. 46.
[2] OJ C 118, 27.4.2000, p. 3.
[3] OJ L 53, 22.2.1985, p. 1.
[4] OJ L 306, 11.11.1997, p. 12.

▼B

within Article 81(1). In the individual assessment of agreements under Article 81(1), account has to be taken of several factors, and in particular the market structure on the relevant market.

(7) 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 81(3).

(8) Agreements on specialisation in production generally contribute to improving the production or distribution of goods, because the undertakings concerned can concentrate on the manufacture of certain products and thus operate more efficiently and supply the products more cheaply. Agreements on specialisation in the provision of services can also be said to generally give rise to similar improvements. It is likely that, given effective competition, consumers will receive a fair share of the resulting benefit.

(9) Such advantages can arise equally from agreements whereby one participant gives up the manufacture of certain products or provision of certain services in favour of another participant ('unilateral specialisation'), from agreements whereby each participant gives up the manufacture of certain products or provision of certain services in favour of another participant ('reciprocal specialisation') and from agreements whereby the participants undertake to jointly manufacture certain products or provide certain services ('joint production').

(10) As unilateral specialisation agreements between non-competitors may benefit from the block exemption provided by Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices [1], the application of the present Regulation to unilateral specialisation agreements should be limited to agreements between competitors.

(11) All other agreements entered into between undertakings relating to the conditions under which they specialise in the production of goods and/or services should fall within the scope of this Regulation. The block exemption should also apply to provisions contained in specialisation agreements which 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.

(12) To ensure that the benefits of specialisation will materialise without one party 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. These obligations may, but do not have to, be of an exclusive nature.

(13) It can be presumed that, where the participating undertakings' share of the relevant market does not exceed 20 %, specialisation agreements as defined in this Regulation 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.

(14) This Regulation should not exempt agreements containing restrictions which are not indispensable to attain the positive effects mentioned above. In principle certain severe anti-competitive restraints 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 undertakings concerned.

(15) The market share limitation, the non-exemption of certain agreements and the conditions provided for in this Regulation normally ensure that the agreements to which the block exemp-

[1] OJ L 336, 29.12.1999, p. 21.

▼B

tion applies do not enable the participating undertakings to eliminate competition in respect of a substantial part of the products or services in question.

(16) In particular cases in which the agreements falling under this Regulation nevertheless have effects incompatible with Article 81(3) of the Treaty, the Commission may withdraw the benefit of the block exemption.

(17) 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 10 years.

(18) This Regulation is without prejudice to the application of Article 82 of the Treaty.

(19) In accordance with the principle of the primacy of Community law, no measure taken pursuant to national laws on competition should prejudice the uniform application throughout the common market of the Community competition rules or the full effect of any measures adopted in implementation of those rules, including this Regulation,

HAS ADOPTED THIS REGULATION:

Article 1

Exemption

1. Pursuant to Article 81(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 81(1) shall not apply to the following agreements entered into between two or more undertakings (hereinafter referred to as 'the parties') which relate to the conditions under which those undertakings specialise in the production of products (hereinafter referred to as 'specialisation agreements'):

(a) unilateral specialisation agreements, by virtue of which one party agrees to cease production of certain products or to refrain from producing those products and to purchase them from a competing undertaking, while the competing undertaking agrees to produce and supply those products; or

(b) reciprocal specialisation agreements, by virtue of which two or more parties on a reciprocal basis agree to cease or refrain from producing certain but different products and to purchase these products from the other parties, who agree to 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 81(1) of the Treaty.

2. The exemption provided for in paragraph 1 shall also apply to provisions contained in specialisation agreements, which do not constitute the primary object of such agreements, but are directly related to and necessary for their implementation, such as those concerning the assignment or use of intellectual property rights.

The first subparagraph does, however, not apply to provisions which have the same object as the restrictions of competition enumerated in Article 5(1).

Article 2

Definitions

For the purposes of this Regulation:

1. 'Agreement' means an agreement, a decision of an association of undertakings or a concerted practice.

▼B

2. 'Participating undertakings' 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, or

(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 provision of services and includes production by way of subcontracting.

6. 'Relevant market' means the relevant product and geographic market(s) to which the products, which are the subject matter of a specialisation agreement, belong.

7. 'Competing undertaking' means an undertaking that is active on the relevant market (an actual competitor) or an undertaking that would, on realistic grounds, undertake the necessary additional investments or other necessary switching costs so that it could enter the relevant market in response to a small and permanent increase in relative prices (a potential competitor).

8. '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.

9. '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.

Article 3

Purchasing and marketing arrangements

The exemption provided for in Article 1 shall also apply where:

(a) the parties accept an exclusive purchase and/or exclusive supply obligation in the context of a unilateral or reciprocal specialisation agreement or a joint production agreement, or

(b) the parties do not sell the products which are the object of the specialisation agreement independently but provide for joint distribution or agree to appoint a third party distributor on an exclusive or non-exclusive basis in the context of a joint production agreement provided that the third party is not a competing undertaking.

▼B

Article 4

Market share threshold

The exemption provided for in Article 1 shall apply on condition that the combined market share of the participating undertakings does not exceed 20 % of the relevant market.

Article 5

Agreements not covered by the exemption

1. The exemption provided for in Article 1 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;

(b) the limitation of output or sales; or

(c) the allocation of markets or customers.

2. Paragraph 1 shall not apply to:

(a) 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 of a production joint venture in the context of a joint production agreement;

(b) the setting of sales targets and the fixing of prices that a production joint venture charges to its immediate customers in the context of point (b) of Article 3.

Article 6

Application of the market share threshold

1. For the purposes of applying the market share threshold provided for in Article 4 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 undertaking concerned;

(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 2 shall be apportioned equally to each undertaking having the rights or the powers listed in point 3(a) of Article 2.

2. If the market share referred to in Article 4 is initially not more than 20 % but subsequently rises above this level without exceeding 25 %, the exemption provided for in Article 1 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 4 is initially not more than 20 % but subsequently rises above 25 %, the exemption provided for in Article 1 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 7

Withdrawal

The Commission may withdraw the benefit of this Regulation, pursuant to Article 7 of Regulation (EEC) No 2821/71, where, either on its own initiative or at the request of a Member State or of a natural or legal person claiming a legitimate interest, it finds in a particular case that an agreement to which the exemption provided for in Article 1 applies

▼B

nevertheless has effects which are incompatible with the conditions laid down in Article 81(3) of the Treaty, and in particular where:

(a) the agreement is not yielding significant results in terms of rationalisation or consumers are not receiving a fair share of the resulting benefit, or

(b) the products which are the subject of the specialisation are not subject in the common market or a substantial part thereof to effective competition from identical products or products considered by users to be equivalent in view of their characteristics, price and intended use.

Article 8

Transitional period

The prohibition laid down in Article 81(1) of the Treaty shall not apply during the period from 1 January 2001 to 30 June 2002 in respect of agreements already in force on 31 December 2000 which do not satisfy the conditions for exemption provided for in this Regulation but which satisfy the conditions for exemption provided for in Regulation (EEC) No 417/85.

▼A1

Article 8a

The prohibition in Article 81(1) of the Treaty shall not apply to agreements which were in existence at the date of accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia and which, by reason of accession, fall within the scope of Article 81(1) if, within six months from the date of accession, they are so amended that they comply with the conditions laid down in this Regulation.

▼B

Article 9

Period of validity

This Regulation shall enter into force on 1 January 2001.

It shall expire on 31 December 2010.

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