Horizontal agreements

Reform is in the air; and the Commission plans to follow up its work on vertical agreements with similar work, mutatis mutandis, on horizontal agreements. (A brief report on the Commission's current proposals will be found on page 108 in this issue.) One of the problems with the introduction of block exemption regulations in the field of horizontal agreements is that, for the most part, anti-trust authorities are highly suspicious of almost all types of restrictive agreement concluded between operators at the same market level: that is, mainly, between manufacturers or between dealers or between purchasers. It follows that there are relatively few types of horizontal agreement which the Commission, or any other anti-trust authority, can safely approve by an "automatic" mechanism like that of block exemption. The two classic examples of readily permissible exemptions are specialisation agreements and research and development agreements; and block exemption regulations have covered these kinds of horizontal agreements for many years. But, in the nature of things, there are no statistics revealing the extent to which these regulations are actually invoked. They may be useful; they may never be used. The likelihood is that their usefulness is limited to a relatively small proportion of the total number of horizontal agreements.

However that may be, the Commission takes the view that the general approach adopted in the existing regulations needs to be changed. The approach hitherto has been to list the various kinds of clause usually to be found in specialisation and R & D agreements and to classify them according to whether they are acceptable, conditionally acceptable or prohibited. This follows the old pattern of block exemption regulations, whether for vertical or for horizontal agreements. The new pattern is more generalised. "The move away from a clause-based approach gives greater contractual freedom to the parties to these agreements. However, hardcore restrictions (price-fixing, output limitation or allocation of markets or customers) will generally remain prohibited." When the Commission refers to "companies holding no significant market power", it is returning to its old hobby-horse about market shares: this was a matter of controversy both in the Technology Licensing regulation and in the context of the new approach to vertical restraints. Different percentages of market shares are proposed in the context of specialisation and R & D agreements respectively.

Reforms dealing with only those two types of agreement are small beer; but the Commission is also proposing guidelines in the fields of standardisation agreements, joint marketing agreements and cooperative joint ventures. Cooperation agreements as such are not covered: the acceptable elements of cooperation agreements are probably covered by the specific provisions of the new regulations and guidelines. ■

The Novartis / AstraZeneca Case

The Commission has decided to open an in-depth investigation into the merger of the crop protection businesses of Novartis and AstraZeneca. The decision to open proceedings was reached after serious concerns had been raised in a number of markets, including fungicides for the protection of cereal crops and sugar beets and herbicides for the protection of maize.

Novartis AG (Switzerland) was created by the merger between Ciba-Geigy and Sandoz in December 1996. Novartis is a multinational group of companies operating world-wide in the field of Life Sciences. Its focus is on health care (pharmaceuticals, generics), agribusiness (crop protection, seeds, animal health) and consumer health (nutrition, self-medication). AstraZeneca (United Kingdom) was created by the merger between Astra AB and Zeneca Group PLC in spring 1999. The business activities of AstraZeneca are the research, development, production and marketing of pharmaceuticals and agrochemicals.

In the proposed merger Novartis and AstraZeneca will spin off and merge their activities in the area of crop protection into a newly incorporated company, Syngenta AG. Novartis will also transfer its seeds business to Syngenta. Syngenta would become the world's leading crop protection business. The Commission's initial investigation showed that serious doubts about the compatibility of the notified operation with the common market exist in a number of markets. The Commission therefore considers that the operation as notified is likely to lead to the creation or strengthening of a dominant position. Serious doubts were found with regard to *fungicides for the protection of cereal crops,* particularly in view of the large combined portfolio of Novartis and AstraZeneca of chemical substances in all classes and especially the new, successful strobilurin based fungicides. Serious doubts were also found with regard to *fungicides for the protection of sugar beets* and *herbicides for the protection of maize.* In addition, concerns that need further investigation have been raised for a number of other fungicides, herbicides and insecticides as well as for some seeds, plant growth regulators, seed treatment products and rodenticides.

In view of the serious doubts arising from the new entity's position in these markets, the Commission decided to initiate proceedings in accordance with the Merger Regulation. The Commission now has a maximum of four months to take a final decision on the case. The opening of a second-phase investigation is only a procedural step and is without prejudice to the final Commission decision. Pursuant to the bilateral agreement of 1991 on antitrust co-operation between the European Commission and the United States of America, the European Commission and the Federal Trade Commission have been collaborating and will continue to do so, especially if and when the two authorities identify common competition concerns, that might require a jointly pursued remedial action.

Source: Commission Statement IP/00/281, dated 21 March 2000