

COMMISSION REGULATION (EU) 2023/1067**of 1 June 2023****on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EEC) No 2821/71 of the Council of 20 December 1971 on application of Article 85(3) of the Treaty to categories of agreements, decisions and concerted practices ⁽¹⁾, and in particular Article 1(1), point (c), thereof,

Having published a draft of this Regulation ⁽²⁾,

After consulting 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 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 such specialisation.
- (2) Commission Regulation (EU) No 1218/2010 ⁽³⁾ defines categories of specialisation agreements which the Commission regarded as normally satisfying the conditions laid down in Article 101(3) of the Treaty. That Regulation expires on 30 June 2023. In view of the overall positive experience with the application of that Regulation and the results of the evaluation of that Regulation, it is appropriate to adopt a new block exemption regulation.
- (3) This Regulation aims to ensure effective protection of competition and to provide adequate legal security for undertakings. The pursuit of those objectives should take account of the need to simplify administrative supervision and the legislative framework to the greatest extent possible.
- (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 structure of the relevant market.
- (5) The benefit of the exemption established by this Regulation 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. Below a certain level of market power, it can in general be presumed, for the application of Article 101(3) of the Treaty, that the positive effects of specialisation agreements will outweigh any negative effects on competition.
- (6) This Regulation should apply to agreements concerning the manufacture of goods and the preparation of services. The preparation of services refers to activities carried out upstream of the provision of services to customers (for example, cooperation in the creation or operation of a platform through which a service will be provided). The provision of services to customers falls outside the scope of this Regulation, except where the parties agree to jointly provide services prepared under the specialisation agreement.

⁽¹⁾ OJ L 285, 29.12.1971, p. 46.

⁽²⁾ OJ C 120, 15.3.2022, p. 1.

⁽³⁾ Commission Regulation (EU) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements (OJ L 335, 18.12.2010, p. 43).

- (7) Specialisation agreements are most likely to contribute to improving the manufacture of goods or the preparation of services and their distribution if the parties have complementary skills, assets or activities, because, in that case, the agreement allows them to focus on the manufacture of certain goods or the preparation of certain services and thus operate more efficiently and supply the products more cheaply. Given effective competition, it is likely that consumers will receive a fair share of the resulting benefits.
- (8) Such benefits can arise first from agreements whereby one or more parties fully or partly give up the manufacture of certain goods or the preparation of certain services in favour of another party or parties ('unilateral specialisation'); second, from agreements whereby two or more parties fully or partly give up the manufacture of certain but different goods or the preparation of certain but different services in favour of another party or parties ('reciprocal specialisation'), and third, from agreements whereby two or more parties undertake to jointly manufacture certain goods or prepare certain services ('joint production').
- (9) The application of this Regulation to unilateral and reciprocal specialisation agreements should be limited to scenarios where the parties are active on the same product market. However, it is not necessary for the parties to be active on the same geographic market. In addition, the concepts of unilateral and reciprocal specialisation should not require a party to reduce capacity, as it is sufficient if they reduce their production volumes.
- (10) To ensure that the benefits of specialisation materialise without one party leaving the market downstream of production entirely, unilateral and reciprocal specialisation agreements should only be covered by this Regulation where they provide for supply and purchase obligations. Supply and purchase obligations may be, but do not have to be, of an exclusive nature.
- (11) This Regulation should apply to joint production agreements entered into by parties that are already active on the same product market but also by parties that wish to enter a product market by means of the joint production agreement. The concept of joint production agreement should not require the parties to reduce their individual activities regarding the manufacture of goods or preparation of services outside the scope of their envisaged joint arrangement.
- (12) It can be presumed that, where the parties' share of the relevant market for the products which are the subject of a specialisation agreement does not exceed a certain level, the agreement 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.
- (13) Where the products covered by a specialisation agreement are intermediary products that are fully or partly used captively by one or more of the parties as an input for their own production of downstream products which they subsequently sell on the market, the exemption conferred by this Regulation should also be conditional on the parties' market share on the relevant market for those downstream products not exceeding a certain level. In that case, taking into account the parties' market share only at the level of the intermediary product would ignore the potential risk of foreclosing or increasing the price of inputs for competitors at the level of the downstream products.
- (14) There is 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 where the market share threshold set out in this Regulation is exceeded or other conditions of this Regulation are not met. In such cases, it is necessary to conduct an individual assessment of the specialisation agreement under Article 101 of the Treaty.
- (15) The exemption established by this Regulation should not apply to agreements containing restrictions which are not indispensable to the attainment of the positive effects generated by specialisation agreements. In principle, agreements containing certain types of severe restrictions of competition, such as the fixing of prices charged to third parties, the limitation of output or sales, and the allocation of markets or customers should be excluded from the benefit of the exemption established by this Regulation, irrespective of the market share of the parties.

- (16) The market share threshold, the non-exemption of certain agreements and the conditions provided for in this Regulation generally 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 goods or services in question.
- (17) This Regulation should indicate typical situations in which it may be considered appropriate to withdraw the benefit of the exemption established by it, pursuant to Article 29 of Council Regulation (EC) No 1/2003 ⁽⁴⁾.
- (18) In order to facilitate the conclusion of specialisation agreements, which can have a bearing on the structure of the parties, the period of validity of this Regulation should be fixed at 12 years,

HAS ADOPTED THIS REGULATION:

Article 1

Definitions

1. For the purposes of this Regulation, the following definitions shall apply:
- (1) 'specialisation agreement' means a unilateral specialisation agreement, a reciprocal specialisation agreement or a joint production agreement;
- (a) 'unilateral specialisation agreement' means an agreement between two or more parties which are active on the same product market and under which one or more parties agree to fully or partly cease production of certain products or to refrain from producing those products and to purchase them from another party or parties, which agree to produce and supply them;
- (b) 'reciprocal specialisation agreement' means an agreement between two or more parties which are active on the same product market and under 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 those products from one or more of the other parties, which agree to produce and supply them;
- (c) 'joint production agreement' means an agreement under which two or more parties agree to produce certain products jointly;
- (2) 'agreement' means an agreement between undertakings, a decision by an association of undertakings or a concerted practice;
- (3) 'product' means a good or a service, including both intermediary goods or services and final goods or services, with the exception of distribution and rental services;
- (4) 'production' means the manufacture of goods or the preparation of services, including by way of subcontracting;
- (5) 'preparation of services' means activities carried out upstream of the provision of services to customers;
- (6) 'specialisation product' means a product which is produced under a specialisation agreement;
- (7) 'downstream product' means a product for which a specialisation product is used as an input by one or more of the parties and which is sold by those parties on the market;
- (8) 'relevant market' means the relevant product and geographic market to which the specialisation products belong, and, in addition, where the specialisation products are intermediary products that are fully or partly used captively by one or more of the parties as inputs for the production of downstream products, the relevant product and geographic market to which the downstream products belong;

⁽⁴⁾ 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 (OJ L 1, 4.1.2003, p. 1).

- (9) 'competing undertaking' means an actual or potential competitor:
- (a) 'actual competitor' means an undertaking that is active on the same relevant market;
 - (b) 'potential competitor' means an undertaking that, in the absence of the specialisation agreement, would, on realistic grounds and not just as a mere theoretical possibility, be likely to undertake, within not more than 3 years, the necessary additional investments or other necessary costs to enter the relevant market;
- (10) 'exclusive supply obligation' means an obligation not to supply the specialisation products to a competing undertaking other than a party or parties to the specialisation agreement;
- (11) 'exclusive purchase obligation' means an obligation to purchase the specialisation products only from a party or parties to the specialisation agreement;
- (12) 'joint', in the context of distribution, means activities where the work involved is:
- (a) carried out by a joint team, organisation or undertaking; or
 - (b) undertaken by a jointly appointed third party distributor on an exclusive or non-exclusive basis, provided that the third party is not a competing undertaking;
- (13) 'distribution' means the sale and supply of the specialisation products to customers, including the commercialisation of those products.

2. For the purposes of this Regulation, the terms 'undertaking' and 'party' shall include their respective connected undertakings. 'Connected undertakings' means:

- (1) undertakings in which a party to the specialisation agreement, directly or indirectly has one or more of the following rights or powers:
 - (a) the power to exercise more than half the voting rights;
 - (b) the power to appoint more than half the members of the supervisory board, board of management or bodies legally representing the undertaking;
 - (c) the right to manage the undertaking's affairs;
- (2) undertakings which directly or indirectly have, over a party to the specialisation agreement, one or more of the rights or powers listed in point (1);
- (3) undertakings in which an undertaking referred to in point (2) has, directly or indirectly, one or more of the rights or powers listed in point (1);
- (4) undertakings in which a party to the specialisation agreement together with one or more of the undertakings referred to in points (1), (2) or (3), or in which two or more of the latter undertakings, jointly have one or more of the rights or powers listed in point (1);
- (5) undertakings in which one or more of the rights or powers listed in point (1) are jointly held by:
 - (a) parties to the specialisation agreement or their respective connected undertakings referred to in points (1) to (4); or
 - (b) one or more of the parties to the specialisation agreement or one or more of their connected undertakings referred to in points (1) to (4) and one or more third parties.

Article 2

Exemption

1. Pursuant to Article 101(3) of the Treaty, and subject to the provisions of this Regulation, Article 101(1) of the Treaty shall not apply to specialisation agreements.

2. The exemption established in paragraph 1 shall apply to the extent that such agreements contain restrictions of competition falling within the scope of Article 101(1) of the Treaty.

3. The exemption established in paragraph 1 shall also apply to specialisation agreements which include provisions on the assignment or licensing of intellectual property rights to one or more of the parties, provided that those provisions are directly related to and necessary for the implementation of the agreement and do not constitute the primary object of the agreement.

4. The exemption established in paragraph 1 shall also apply to specialisation agreements whereby:

(a) the parties accept an exclusive purchase or an exclusive supply obligation; or

(b) the parties jointly distribute the specialisation products.

Article 3

Market share threshold

1. The exemption established in Article 2 shall apply on condition that the combined market share of the parties does not exceed 20 % on the relevant market(s) to which the specialisation products belong.

2. Where the specialisation products are intermediary products that are fully or partly used captively by one or more of the parties as inputs for the production of downstream products, which they also sell, the exemption established in Article 2 shall only apply if both of the following conditions are fulfilled:

(a) the parties' combined market share does not exceed 20 % on the relevant market(s) to which the specialisation products belong;

(b) the parties' combined market share does not exceed 20 % on the relevant market(s) to which the downstream products belong.

Article 4

Application of the market share threshold

For the purposes of applying the market share threshold provided for in Article 3, the following rules shall apply:

(a) market shares shall be calculated on the basis of 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;

(b) market shares shall be calculated on the basis of data relating to the preceding calendar year or, where the preceding calendar year is not representative of the parties' position in the relevant market(s), market shares shall be calculated as an average of the parties' market shares for the 3 preceding calendar years;

(c) the market share held by the undertakings referred to in Article 1(2), point (5) shall be apportioned equally to each undertaking having one or more of the rights or powers listed in Article 1(2), point (1);

(d) if the market shares referred to in Article 3 are initially not more than 20 %, but subsequently rise above that level in at least one of the relevant markets, the exemption established in Article 2 shall continue to apply for a period of 2 consecutive calendar years following the year in which the 20 % threshold was first exceeded.

*Article 5***Hardcore restrictions**

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

- (a) the fixing of prices when selling the specialisation 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:
 - (i) provisions on the agreed amount of products in the context of unilateral or reciprocal specialisation agreements;
 - (ii) the setting of capacity and production volumes in the context of a joint production agreement;
 - (iii) the setting of sales targets in the context of joint distribution;
- (c) the allocation of markets or customers.

*Article 6***Withdrawal in individual cases by the Commission**

1. The Commission may withdraw the benefit of the exemption established by this Regulation, pursuant to Article 29(1) of Regulation (EC) No 1/2003, where it finds, in any particular case, that a specialisation agreement to which the exemption established by this Regulation applies nevertheless has effects which are incompatible with Article 101(3) of the Treaty.

2. The Commission may withdraw the benefit of the exemption established by this Regulation pursuant to Article 29(1) of Regulation (EC) No 1/2003 in particular where the relevant market is highly concentrated and competition is already weak, for example due to one or more of the following:

- (a) the individual market positions of other market participants;
- (b) links between other market participants created by parallel specialisation agreements;
- (c) links between the parties and other market participants.

*Article 7***Withdrawal in individual cases by the competition authority of a Member State**

The competition authority of a Member State may withdraw the benefit of the exemption established by this Regulation where the conditions of Article 29(2) of Regulation (EC) No 1/2003 are fulfilled.

*Article 8***Transitional period**

The prohibition laid down in Article 101(1) of the Treaty shall not apply during the period from 1 July 2023 to 30 June 2025 in respect of agreements already in force on 30 June 2023 which do not satisfy the conditions for exemption established by this Regulation but which satisfy the conditions for exemption established by Regulation (EU) No 1218/2010.

*Article 9***Entry into force and application**

This Regulation shall enter into force on 1 July 2023.

It shall apply until 30 June 2035.

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

Done at Brussels, 1 June 2023.

For the Commission
The President
Ursula VON DER LEYEN
