

Commission notice of 18 December 1978 concerning its assessment of certain subcontracting agreements in relation to Article 85 (1) of the EEC Treaty

1. In this notice the Commission of the European Communities gives its view as to subcontracting agreements in relation to Article 85 (1) of the Treaty establishing the European Economic Community. This class of agreement is at the present time a form of work distribution which concerns firms of all sizes, but which offers opportunities for development in particular to small and medium sized firms.

The Commission considers that agreements under which one firm, called 'the contractor', whether or not in consequence of a prior order from a third party, entrusts to another, called 'the subcontractor', the manufacture of goods, the supply of services or the performance of work under the contractor's instructions, to be provided to the contractor or performed on his behalf, are not of themselves caught by the prohibition in Article 85 (1).

To carry out certain subcontracting agreements in accordance with the contractor's instructions, the subcontractor may have to make use of particular technology or equipment which the contractor will have to provide. In order to protect the economic value of such technology or equipment, the contractor may wish to restrict their use by the subcontractor to whatever is necessary for the purpose of the agreement. The question arises whether such restrictions are caught by Article 85 (1). They are assessed in this notice with due regard to the purpose of such agreements, which distinguishes them from ordinary patent and know-how licensing agreements.

2. In the Commission's view, Article 85 (1) does not apply to clauses whereby:

- technology or equipment provided by the contractor may not be used except for the purposes of the subcontracting agreement,
- technology or equipment provided by the contractor may not be made available to third parties,
- the goods, services or work resulting from the use of such technology or equipment may be supplied only to the contractor or performed on his behalf,

provided that and in so far as this technology or equipment is necessary to enable the subcontractor

under reasonable conditions to manufacture the goods, to supply the services or to carry out the work in accordance with the contractor's instructions. To that extent the subcontractor is providing goods, services or work in respect of which he is not an independent supplier in the market.

The above proviso is satisfied where performance of the subcontracting agreement makes necessary the use by the subcontractor of:

- industrial property rights of the contractor or at his disposal, in the form of patents, utility models, designs protected by copyright, registered designs or other rights, or
- secret knowledge or manufacturing processes (know-how) of the contractor or at his disposal, or of
- studies, plans or documents accompanying the information given which have been prepared by or for the contractor, or
- dies, patterns or tools, and accessory equipment that are distinctively the contractor's,

which, even though not covered by industrial property rights nor containing any element of secrecy, permit the manufacture of goods which differ in form, function or composition from other goods manufactured or supplied on the market.

However, the restrictions mentioned above are not justifiable where the subcontractor has at his disposal or could under reasonable conditions obtain access to the technology and equipment needed to produce the goods, provide the services or carry out the work. Generally, this is the case when the contractor provides no more than general information which merely describes the work to be done. In such circumstances the restrictions could deprive the subcontractor of the possibility of developing his own business in the fields covered by the agreement.

3. The following restrictions in connection with the provision of technology by the contractor may in the Commission's view also be imposed by

subcontracting agreements without giving grounds for objection under Article 85 (1):

- an undertaking by either of the parties not to reveal manufacturing processes or other know-how of a secret character, or confidential information given by the other party during the negotiation and performance of the agreement, as long as the know-how or information in question has not become public knowledge,
- an undertaking by the subcontractor not to make use, even after expiry of the agreement, of manufacturing processes or other know-how of a secret character received by him during the currency of the agreement, as long as they have not become public knowledge,
- an undertaking by the subcontractor to pass on to the contractor on a non-exclusive basis any technical improvements which he has made during the currency of the agreement, or, where a patentable invention has been discovered by the subcontractor, to grant non-exclusive licences in respect of inventions relating to improvements and new applications of the original invention to the contractor for the term of the patent held by the latter.

This undertaking by the subcontractor may be exclusive in favour of the contractor in so far as improvements and inventions made by the subcontractor during the currency of the agreement are incapable of being used independently of the contractor's secret know-how or patent, since this does not constitute an appreciable restriction of competition.

However, any undertaking by the subcontractor regarding the right to dispose of the results of his

own research and development work may restrain competition, where such results are capable of being used independently. In such circumstances, the subcontracting relationship is not sufficient to displace the ordinary competition rules on the disposal of industrial property rights or secret know-how.

4. Where the subcontractor is authorized by a subcontracting agreement to use a specified trade mark, trade name or get up, the contractor may at the same time forbid such use by the subcontractor in the case of goods, services or work which are not to be supplied to the contractor.

5. Although this notice should in general obviate the need for firms to obtain a ruling on the legal position by an individual Commission Decision, it does not affect the right of the firms concerned to apply for negative clearance as defined by Article 2 of Regulation No 17 or to notify the agreement to the Commission under Article 4 (1) of that Regulation ⁽¹⁾.

The 1968 notice on cooperation between enterprises ⁽²⁾, which lists a number of agreements that by their nature are not to be regarded as anti-competitive, is thus supplemented in the subcontracting field. The Commission also reminds firms that, in order to promote cooperation between small and medium sized businesses, it has published a notice concerning agreements of minor importance which do not fall under Article 85 (1) of the Treaty establishing the European Economic Community ⁽³⁾.

This notice is without prejudice to the view that may be taken of subcontracting agreements by the Court of Justice of the European Communities.

⁽¹⁾ First Regulation implementing Articles 85 and 86 of the EEC Treaty (OJ No 13, 21. 2. 1962, p. 204/62).

⁽²⁾ Notice concerning agreements, decisions and concerted practices relating to cooperation between enterprises (OJ No C 75, 29. 7. 1968, p. 3).

⁽³⁾ OJ No C 313, 29. 12. 1977, p. 3.