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ANNEX

ANNEX

to the

COMMUNICATION FROM THE COMMISSION

**Approval of the content of a draft for a Commission Regulation on the application of
Article 101(3) of the Treaty on the Functioning of the European Union to certain
categories of specialisation agreements**

ANNEX

COMMISSION REGULATION (EU) .../...

of XXX

on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements

DRAFT

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 practices¹,

Having published a draft of this Regulation,

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 on the Functioning of the European Union* 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 (EC) No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty to categories of specialisation agreements² defines categories of specialisation agreements which the Commission regarded as normally satisfying the conditions laid down in Article 101(3) of the Treaty. In view of the overall positive experience with the application of that Regulation, which expires on 31 December 2022, and taking into account the results of the review procedure, it is appropriate to adopt a new block exemption regulation.
- (3) This Regulation should meet the two requirements of (i) ensuring effective protection of competition and (ii) providing 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 as great an extent as possible.
- (4) 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.

¹ OJ L 285, 29.12.1971, p. 46.

(*) With effect from 1 December 2009, Article 81 of the EC Treaty (previously Article 85 of the EEC Treaty) has become Article 101 of the Treaty. These provisions are, in substance, identical. For the purposes of this Regulation, references to Article 85 of the EEC Treaty or Article 81 of the EC Treaty should be understood as references to Article 101 of the Treaty where appropriate.

² OJ L 335, 18.12.2010, p. 43.

- (5) 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 market structure on the relevant market.
- (6) 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.
- (7) Specialisation agreements are most likely to contribute to improving the manufacture of goods or the preparation of services or their distribution, if the parties have complementary skills, assets or activities, because they can concentrate on the manufacture of those goods or the preparation of those 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 advantages can arise from: (a) agreements whereby a party or parties fully or partly gives up the manufacture of certain goods or the preparation of certain services in favour of another party or parties ('unilateral specialisation'); (b) agreements whereby each party fully or partly gives up the manufacture of certain but different goods or the preparation of certain services in favour of another party or parties ('reciprocal specialisation') and (c) 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 services concerns the preparation of services (as opposed to the provision of services). The preparation of services refers to activities upstream of the provision of services to customers (for example, cooperation in the creation of a platform through which a service will be provided). The provision of services falls outside the scope of this Regulation, except in the context of distribution in which the parties provide the services prepared and the products manufactured under the specialisation agreement.
- (10) 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 do not require a party to reduce capacity, as it is sufficient if they reduce their production volumes.
- (11) To ensure that the benefits of specialisation will 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, but do not have to, be of an exclusive nature.
- (12) This Regulation applies to joint production agreements entered into by parties who are already active on the same product market but also by parties who wish to enter a product market by way of the joint production agreement. In addition, the concept of joint production agreement does 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.
- (13) It can be presumed that, where the parties' share of the relevant market for the products which are the subject matter of a specialisation agreement does not exceed a

certain level, the agreements 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) Where the products covered by a specialisation agreement are intermediary products which one or more of the parties fully or partly use as an input for their own downstream products which they subsequently sell on the market, the exemption conferred by this Regulation should also be conditional on the parties' share on the relevant market for these downstream products not exceeding a certain level. In such a case, merely looking at the parties' market share 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.
- (15) 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 once the market share threshold set out in this Regulation is exceeded or other conditions of this Regulation are not met. In such cases, an individual assessment of the specialisation agreement needs to be conducted under Article 101 of the Treaty.
- (16) This Regulation should not exempt agreements containing restrictions which are not indispensable to the attainment of the positive effects generated by a specialisation agreement. In principle, agreements containing certain types of severe restrictions of competition 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 exemption established by this Regulation irrespective of the market share of the parties.
- (17) 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 exemption applies do not enable the parties to eliminate competition in respect of a substantial part of the products or services in question.
- (18) The benefit of this Regulation may be withdrawn pursuant to Article 29 of 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.³
- (19) 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:

TITLE I

DEFINITIONS

Article 1 – Definitions

1. For the purposes of this Regulation, the following definitions shall apply:

³ OJ L 1, 4.1.2003, p. 1.

- (a) ‘specialisation agreement’ means a unilateral specialisation agreement, a reciprocal specialisation agreement or a joint production agreement;
 - (1) ‘unilateral specialisation agreement’ means an agreement between two or more parties which are active on the same product market and by virtue of which a party or parties agree to fully or partly cease production of certain products or to refrain from producing those products and to purchase them from the other party or parties, who agree to produce and supply those products;
 - (2) ‘reciprocal specialisation agreement’ means an agreement between two or more parties which are active on the same product market and by virtue of 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 these products from the other parties, who agree to produce and supply them;
 - (3) ‘joint production agreement’ means an agreement by virtue of which two or more parties agree to produce certain products jointly;
- (b) ‘agreement’ means an agreement, a decision by an association of undertakings or a concerted practice;
- (c) ‘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;
- (d) ‘production’ means the manufacture of goods or the preparation of services, including by way of subcontracting;
- (e) ‘preparation of services’ means activities upstream of the provision of services to customers;
- (f) ‘specialisation product’ means a product which is produced under a specialisation agreement;
- (g) ‘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;
- (h) ‘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 which one or more of the parties fully or partly use captively as input for downstream products, the relevant product and geographic market to which the downstream products belong;
- (i) ‘competing undertaking’ means an actual or potential competitor:
 - (1) ‘actual competitor’ means an undertaking that is active on the same relevant market;
 - (2) ‘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;

- (j) 'exclusive supply obligation' means an obligation not to supply the specialisation products to a competing undertaking other than a party or parties to the agreement;
- (k) 'exclusive purchase obligation' means an obligation to purchase the specialisation products only from a party or parties to the agreement;
- (l) 'joint', in the context of distribution, means activities where the work involved is:
 - (1) carried out by a joint team, organisation or undertaking, or
 - (2) 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;
- (m) 'distribution' means the provision of the specialisation products.

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

'Connected undertakings' means:

- (a) undertakings in which a party to the specialisation agreement, directly or indirectly:
 - (i) has the power to exercise more than half the voting rights,
 - (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 specialisation agreement, the rights or powers listed in point (a);
- (c) undertakings in which an undertaking referred to in point (b) has, directly or indirectly, the rights or powers listed in point (a);
- (d) undertakings in which a party to the specialisation agreement together with one or more of the undertakings referred to in points (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in point (a);
- (e) undertakings in which the rights or the powers listed in point (a) are jointly held by:
 - (i) parties to the specialisation agreement or their respective connected undertakings referred to in points (a) to (d), or
 - (ii) one or more of the parties to the specialisation agreement or one or more of their connected undertakings referred to in points (a) to (d) and one or more third parties.

TITLE II

EXEMPTION

Article 2 – Exemption

1. Pursuant to Article 101(3) of the Treaty, and subject to the provisions of this Regulation, it is hereby declared that Article 101(1) of the Treaty shall not apply to specialisation agreements.
2. The exemption provided for 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 provided for 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:
 - (a) do not constitute the primary object of such agreements, and
 - (b) are directly related to and necessary for the implementation of the such agreements.
4. The exemption provided for 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 and do not independently sell them.

TITLE III

THRESHOLDS

Article 3 – Market share thresholds

1. The exemption provided for 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 which one or more of the parties fully or partly use captively for the production of downstream products, which they also sell, the exemption foreseen in Article 2 is conditional upon:
 - (a) a combined market share not exceeding 20 % on the relevant market(s) to which the specialisation products belong, and
 - (b) a combined market share not exceeding 20 % on the relevant market(s) to which the downstream products belong.

Article 4 – Application of the market share thresholds

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

1. 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 parties;
2. the market share shall be calculated on the basis of data relating to the preceding calendar year; or, alternatively, when the preceding calendar year is not representative of the parties' position in the relevant market(s), the market share shall be calculated as an average of the parties' market shares of the last three preceding calendar years;
3. the market share held by the undertakings referred to in Article 1(2), second subparagraph, point (e) shall be apportioned equally to each undertaking having the rights or the powers listed in Article 1(2), second subparagraph, point (a);
4. if the market shares referred to in Article 3 are initially not more than 20 %, but subsequently rises above that level in at least one of the markets concerned by the specialisation agreement, the exemption provided for in Article 2 shall continue to apply for a period of two consecutive calendar years following the year in which the 20 % threshold was first exceeded.

TITLE IV

HARDCORE RESTRICTIONS

Article 5 – Hardcore restrictions

The exemption provided for 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:

1. 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;
2. the limitation of output or sales,
with the exception of:
 - (a) provisions on the agreed amount of products in the context of unilateral or reciprocal specialisation agreements; or
 - (b) provisions on setting capacity and production volumes in the context of a joint production agreement; and
 - (c) the setting of sales targets in the context of joint distribution;
3. the allocation of markets or customers.

TITLE V

WITHDRAWAL PROCEDURE

Article 6 – Withdrawal in individual cases by the European Commission

1. The Commission may withdraw the benefit of 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 provided for in this Regulation applies, nevertheless has effects which are incompatible with Article 101(3) of the Treaty.
2. The benefit of this Regulation could be withdrawn pursuant to Article 29(1) of Regulation (EC) No 1/2003 in particular where:
 - (a) the relevant market is very concentrated, and
 - (b) competition is already weak, in particular because of:
 - (i) the individual market positions of other market participants, or
 - (ii) the links between other market participants created by parallel specialisation agreements.

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

1. The competition authority of a Member State may withdraw the benefit of this Regulation, pursuant to Article 29(2) of Regulation (EC) No 1/2003, in respect of the territory of that Member State, or in a part thereof, where it finds in any particular case that a specialisation agreement to which the exemption provided for in this Regulation applies, nevertheless has effects which are incompatible with Article 101(3) of the Treaty in respect of the territory of that Member State, or in a part thereof, and where that territory has all the characteristics of a distinct geographic market.
2. The benefit of this Regulation could be withdrawn by a competition authority of a Member State pursuant to Article 29(2) of Regulation (EC) No 1/2003, in particular where the circumstances as set out in Article 6(2)(a) and (b) of this Regulation apply.

TITLE VI

FINAL PROVISIONS

Article 8 – Transitional period

The prohibition laid down in Article 101(1) of the Treaty shall not apply during the period from 1 January 2023 to 31 December 2024 in respect of agreements already in force on 31 December 2022 which do not satisfy the conditions for exemption provided for in this Regulation but which satisfy the conditions for exemption provided for in Regulation (EC) No 1218/2010.

Article 9 – Period of validity

1. This Regulation shall enter into force on 1 January 2023.
2. It shall expire on 31 December 2034.

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

Done at Brussels,

For the Commission
The President
Ursula von der Leyen