

II

(Acts whose publication is not obligatory)

COUNCIL

DECISION No 1/2002 OF THE ASSOCIATION COUNCIL, ASSOCIATION BETWEEN THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES, OF THE ONE PART, AND THE REPUBLIC OF HUNGARY, OF THE OTHER PART,

of 29 January 2002

repealing and replacing Decision No 2/96 of the Association Council adopting the rules necessary for the implementation of Article 62(1)(i), (1)(ii) and (2) of the Europe Agreement between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part, and the rules implementing Article 8(1)(i), (1)(ii) and (2) of Protocol No 2 on ECSC products to that Europe Agreement

(2002/412/EC, ECSC, Euratom)

THE ASSOCIATION COUNCIL,

Having regard to the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part ⁽¹⁾, and in particular Article 62(3) thereof,

Having regard to Protocol No 2 on ECSC products to that Europe Agreement and in particular Article 8(3) thereof,

Whereas:

(1) On 6 November 1996 the Association Council adopted Decision No 2/96 adopting the rules necessary for the implementation of Article 62(1)(i), (1)(ii) and (2) of the Europe Agreement, and the rules implementing Article 8(1)(i), (1)(ii) and (2) of Protocol No 2 on ECSC products to that Europe Agreement ⁽²⁾.

(2) In Judgement No 30 of 25 June 1998 the Hungarian Constitutional Court declared the first and second paragraphs of Article 1 and Article 6 of the Annex to the Hungarian Government Decree No 230 of 26 December 1996, which transposed Decision No 2/96 of the Association Council into the Hungarian legal system, unconstitutional.

(3) The criteria arising from the application of the rules of Articles 85 and 86 of the EC Treaty (now Articles 81 and 82 EC) as referred to in Article 62(2) of the Europe Agreement as well as the criteria arising from the application of the rules of Articles 65 and 66 ECSC as

referred to in Article 8(2) of Protocol No 2 on ECSC products to that Europe Agreement need to be further specified, so that they can enter the Hungarian legal system in a way complying with the Hungarian Constitution and the constitutional concerns expressed in the above judgement of the Hungarian Constitutional Court.

(4) In so specifying the criteria, several purposes need to be taken into account according to the procedure in which the criteria are applied or invoked.

(5) The criteria shall be specified in different ways according to those different purposes,

HAS DECIDED AS FOLLOWS:

Article 1

Decision No 2/96 of the Association Council, including its Annex, is hereby repealed and replaced by the present Decision of the Association Council, (including its Annex hereto and the Appendix attached to that Annex.

Article 2

Any practices under Article 62(1)(i) and (ii) of the Europe Agreement and Article 8(1)(i) and (ii) of Protocol No 2 on ECSC products to that Europe Agreement shall be assessed according to the provisions set out in the Annex to the new Decision.

⁽¹⁾ OJ L 347, 31.12.1993, p. 1.

⁽²⁾ OJ L 295, 20.11.1996, p. 29.

Article 3

At the request of either Party, the Association Committee shall review the Appendix attached to the Annex to this Decision, with a view to adapting it to newly adopted or amended Community acts.

Article 4

This Decision shall enter into force on the first day of the third month following the adoption of this Decision.

Done at Brussels, 29 January 2002.

For the Association Council

The President

J. PIQUÉ I CAMPS

ANNEX

IMPLEMENTING RULES FOR THE APPLICATION OF THE COMPETITION PROVISIONS APPLICABLE TO UNDERTAKINGS PROVIDED FOR IN ARTICLE 62(1)(i), (1)(ii) AND (2) OF THE EUROPE AGREEMENT BETWEEN THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES, OF THE ONE PART, AND THE REPUBLIC OF HUNGARY, OF THE OTHER PART, AND THE RULES IMPLEMENTING ARTICLE 8(1)(i), (1)(ii) AND (2) OF PROTOCOL No 2 ON ECSC PRODUCTS TO THAT EUROPE AGREEMENT

TITLE I

SUBSTANTIVE RULES

The definition of the criteria referred to in Article 62(2) of the Europe Agreement

Article 1

Without prejudice to the obligations of the Parties under the Europe Agreement,

- for all purposes that might arise in the context of the invocation, interpretation or application of the criteria referred to in Article 62(2) of the Europe Agreement in procedures before the Commission of the European Communities under the present Annex, these criteria shall comprise all substantive norms of the *acquis communautaire* as they are developed by the Community institutions in the field of Community anti-trust law,
- for all purposes that might arise in the context of the invocation, interpretation or application of the criteria referred to in Article 62(2) of the Europe Agreement in procedures before the Hungarian Office of Economic Competition and the Hungarian courts under the present Annex, these criteria shall comprise the substantive rules specified in Articles 2 to 5 of the present Annex as well as its Appendix.

Agreements between undertakings, decisions by associations of undertakings and concerted practices

Article 2

1. The following shall be prohibited as incompatible with the functioning of the Europe Agreement:

all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Parties and which have as their object or effect the prevention, restriction or distortion of competition within the territory covered by the Europe Agreement and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives,
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

4. Without prejudice to paragraphs 1 to 3, for the assessment of the agreements, decisions and concerted practices referred to in paragraph 1, the principles contained in the acts of the European Communities listed in the Appendix attached to the present Annex shall also apply *mutatis mutandis*.

Abuse of a dominant position

Article 3

Any abuse by one or more undertakings of a dominant position within the territory covered by the Europe Agreement or in a substantial part of it shall be prohibited as incompatible with the functioning of the Europe Agreement insofar as it may affect trade between the Parties.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers,

- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Effect on trade between the Community and Hungary

Article 4

For the purposes of Article 62(1)(i)-(ii) and (2) of the Europe Agreement and of this present Annex, the question of whether an anti-competitive agreement or the abuse of a dominant position may have an effect on trade between the Community and Hungary shall be determined by establishing, on the basis of a set of objective factors of law or of fact, whether the practice in question may have an influence, direct or indirect, actual or potential on the pattern of trade between the Community and Hungary.

Activities of minor importance

Article 5

1. Anti-competitive activities under Article 2(1) whose effects on trade between the Parties or on competition are negligible do not fall under Article 62(1) (i) of the Europe Agreement and under the prohibition in Article 2(1) of the present Annex and, therefore, are not to be treated under the present Annex.

2. Negligible effects within the meaning of paragraph 1 are generally presumed to exist when the aggregate market shares held by all of the participating undertakings with regard to the goods or services which are the subject of the agreement together with the participating undertakings' other goods or services which are considered by users to be equivalent in view of their characteristics, price and intended use, do not exceed:

- (a) the 5 % threshold, where the agreement is made between undertakings operating at the same level of production or of marketing ('horizontal' agreement);
- (b) the 10 % threshold, where the agreement is made between undertakings operating at different levels of production or of marketing ('vertical' agreement);

of the total market for such goods or services in the area of the common market affected by the agreement, and the Hungarian market affected by the agreement, respectively.

In the case of a mixed horizontal/vertical agreement or where it is difficult to classify the agreement as either horizontal or vertical, the 5 % threshold is applicable.

3. The said agreements do not fall under Article 62(1)(i) of the Europe Agreement and under the prohibition in Article 2(1) of the present Annex if the above market shares are exceeded by no more than one-tenth during two successive financial years.

4. With regard to:

- (a) horizontal agreements which have as their object:
 - to fix prices or to limit production or sales, or
 - to share markets or sources of supply;
- (b) vertical agreements which have as their object:
 - to fix resale prices, or
 - to confer territorial protection on the participating undertakings or third undertakings,

the provisions of Article 62(1)(i) of the Europe Agreement and the prohibition in Article 2(1) of the present Annex may be applied even where the aggregate market shares held by all of the participating undertakings remain below the above thresholds.

TITLE II

COMPETENCE OF THE COMPETITION AUTHORITIES AND PROCEDURAL RULES

Competence of the competition authorities of the Parties

Article 6

1. The cases under Article 62(1)(i) and (ii) of the Europe Agreement are dealt with by the Commission of the European Communities (Competition Directorate-General) on the Community side, and the Office of Economic Competition on the Hungarian side, according to the procedural rules under this Title.

2. The competence of the Commission of the European Communities and the Office of Economic Competition to deal with these cases shall flow from the existing procedural rules of the respective legislation of the Community and Hungary, including where these rules are applied to undertakings located outside the respective territory.

Competence of both competition authorities (notification, consultation, comity and finding a mutually acceptable solution)

Article 7

1. The competition authorities shall notify to each other those cases they are dealing with, which appear also to fall under the competence of the other authority.

2. This situation may arise in particular in cases concerning activities that:

- involve anti-competitive activities carried out in the other authority's territory,
- are relevant to enforcement activities of the other competition authority,
- involve remedies that would require or prohibit particular conduct in the other authority's territory.

3. Notification under this Article shall include sufficient information to permit an initial evaluation by the recipient party of any effects on its interests. Copies of the notifications shall be submitted on a regular basis to the Association Committee.

4. Notification shall be made in advance, as soon as possible and at the latest at the stage of an investigation still far enough in advance of the adoption of a settlement or decision, so as to facilitate comments or consultations and to enable the proceeding authority to take into account the other authority's views, as well as to take such remedial action it may find feasible in accordance with the present Annex, in order to deal with the case in question.

5. Whenever the Commission of the European Communities or the Office of Economic Competition consider that anti-competitive activities carried out on the territory of the other authority are substantially affecting important interests of the respective Party, it may request consultation with the other authority, or it may request that the other party's competition authority initiate any appropriate procedures with a view to taking remedial action. This is without prejudice to any action by the requesting Party under the present Annex and does not hamper the full freedom of ultimate decision of the authority so addressed.

6. The competition authority so addressed shall give full and sympathetic consideration to such views and factual materials as may be provided by the requesting authority and, in particular, to the nature of the anti-competitive activities in question, the enterprises involved and the alleged harmful effects on the important interests of the requesting Party.

7. Without prejudice to any of their rights or obligations, the competition authorities involved in consultations under this Article shall endeavour to find a mutually acceptable solution in the light of the respective important interests involved.

Competence of one competition authority only

Article 8

Cases falling under the exclusive competence of one competition authority, and which may affect important interests of the other Party, shall be notified to the other authority, without formal request by the latter.

Request for information

Article 9

1. Whenever the competition authority of a Party becomes aware of the fact that a case, falling also or only under the competence of the other authority, appears to affect important interests of the first Party, it may request information about this case from the proceeding authority.

2. The proceeding authority shall give sufficient information to the extent possible and at a stage of its proceedings far enough in advance of the adoption of a decision or settlement to enable the requesting authority's views to be taken into account.

Secrecy and confidentiality of information

Article 10

1. Having regard to Article 62(7) of the Europe Agreement, neither competition authority is required to provide information to the other authority if disclosure of that information to

the requesting authority is prohibited by the law of the authority possessing the information, or would be incompatible with important interests of the Party whose authority is in possession of the information.

2. Each authority agrees to maintain, to the fullest extent possible, the confidentiality of any information provided to it in confidence by the other authority.

Merger control

Article 11

Whenever the Commission of the European Communities applies Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings with regard to transactions that have a significant impact on the Hungarian economy, the Office of Economic Competition shall be entitled to express its view in the course of the procedure taking into account the time limits as provided for in the aforementioned Regulation. The Commission of the European Communities shall give due consideration to that view, without prejudice to its powers to take appropriate actions.

Association Council

Article 12

1. Whenever the procedures provided for in the Articles above do not lead to a mutually acceptable solution, as well as in other cases explicitly mentioned in these Implementing Rules, an exchange of views shall take place in the Association Council at the request of one Party within three months following the request.

2. Following this exchange of views, or after expiry of the period referred to in paragraph 1, the Association Council may make appropriate recommendations for the settlement of these cases, without prejudice to Article 62(6) of the Europe Agreement. In these recommendations, the Association Council may take into account eventual failure of the requested authority to give its point of view to the requesting authority within the period referred to in paragraph 1 to this Article.

3. These procedures in the Association Council are without prejudice to the powers of the competition authorities of the Parties under the present Annex to take appropriate actions.

Negative conflict of competence

Article 13

When both the Commission of the European Communities and the Office of Economic Competition consider that neither of them is competent to handle a case on the basis of their respective legislation, an exchange of views shall take place on request in the Association Council. The Community and Hungary shall endeavour to find a mutually acceptable solution. The Association Council may make appropriate recommendations without prejudice to Article 62(6) of the Europe Agreement and the rights of individual Member States of the European Communities on the basis of their competition rules.

Administrative assistance*Article 14*

The Commission of the European Communities and the Office of Economic Competition shall provide for practical arrangements for mutual assistance or any other appropriate solution concerning in particular the question of translations.

Article 15

The acts listed in the Appendix attached to the present Annex shall be published in Hungary in the Hungarian language. The publication may contain the necessary explicative and adaptatory notes.

ECSC Treaty*Article 16*

The provisions contained in the present Annex shall, *mutatis mutandis*, also apply with respect to the coal and steel sector as referred to in Protocol 2 to the Europe Agreement.

*Appendix***ACTS REFERRED TO IN ARTICLE 2(4) OF THE ANNEX****A. Vertical agreements**

- 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 (OJ L 336, 29.12.1999 p. 21).
- Commission Regulation (EC) No 1475/95 of 28 June 1995 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements (OJ L 145, 29.6.1995, p. 25).

B. Licensing agreements for the transfer of technology

- Commission Regulation (EC) No 240/96 of 31 January 1996 on the application of Article 85(3) of the Treaty to certain categories of technology transfer agreements (OJ L 31, 9.2.1996, p. 2).

C. Specialisation and research and development agreements

- 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 (OJ L 304, 5.12.2000, p. 3).
- Commission Regulation (EC) No 2659/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements (OJ L 304, 5.12.2000, p. 7).

D. Insurance sector

- Council Regulation (EEC) No 1534/91 of 31 May 1991 on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector (OJ L 143, 7.6.1991, p. 1).
- Commission Regulation (EEC) No 3932/92 of 21 December 1992 on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector (OJ L 398, 31.12.1992, p. 7).

E. Transport

- Council Regulation (EEC) No 1017/68 of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway (OJ L 175, 23.7.1968, p. 1 (in particular Article 4: exemption for groups of small and medium-sized undertakings)).
- Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport (OJ L 378, 31.12.1986, p. 4 (in particular Articles 3 and 6: exemption for agreements between carriers concerning the operation of scheduled maritime transport services, and exemption for agreements between transport users and conferences concerning the use of scheduled maritime transport services)).
- Commission Regulation (EC) No 823/2000 of 19 April 2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) (OJ L 100, 20.4.2000, p. 24).
- Commission Regulation (EEC) No 1617/93 of 25 June 1993 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices concerning joint planning and coordination of schedules, joint operations, consultations on passenger and cargo tariffs on scheduled air services and slot allocation at airports (OJ L 155, 26.6.1993, p. 18 (as amended by Regulation (EC) No 1523/96 (OJ L 190, 31.7.1996, p. 11) and Regulation (EC) No 1083/1999 (OJ L 131, 27.05.1999 p. 27))).

F. Notices of the Commission of the European Communities

- Notice concerning its assessment of certain subcontracting agreements in relation to Article 85(1) of the EEC Treaty (OJ C 1, 3.1.1979, p. 2).
 - Notice on the application of the EC competition rules to cross-border credit transfers (OJ C 251, 27.9.1995, p. 3).
 - Commission Communication on clarification of Commission recommendations on the application of competition rules to new transport infrastructure projects (OJ C 298, 30.9.1997).
 - Notice on the definition of the relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p. 5).
 - Commission notice — Guidelines on vertical restraints (OJ C 291, 13.10.2000, p. 1).
 - Commission Notice — Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (OJ C 3, 6.1.2001, p. 2).
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