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BY EMAIL

European Commission
Directorate – General for Competition
Anti-Trust Registry

Email: comp-greffe-antitrust@ec.europa.eu

Ref: HT.1407-Stakeholder Input

Dear Sirs

Review of The Current Regime For The Assessment of Horizontal Cooperation Agreements.

Please find set out below our comments on the Research and Development ("R&D") Block Exemption, the Specialisation Block Exemption and the Horizontal Agreements Guidelines.

Guidelines on production agreements

- Practical examples

1. Given the wide range of scenarios in which the rules apply and given that any advice is market and fact specific, the few practical examples which the Commission gives in the guidelines at the end of the section dealing with production agreements are not, perhaps, so helpful. They appear to us to be overly restrictive; we have taken the view on a number of occasions that agreements which would be a problem in light of those examples will not in fact create significant harmful effects for competition and that an individual exemption would be justified. Relevant sectors in which we have taken this approach include in respect of construction materials.

In our experience, sometimes the parties have felt frustrated where a proposed production agreement may result in high commonality of costs and would be prohibited under the Commission's Guidelines, but the parties have been adamant that the market is competitive and that they will remain so individually. This has occurred in tendering markets.

- Outsourcing of Services

2. We have difficulty applying the Specialisation Block Exemption to the outsourcing of services and wonder whether that situation might best be dealt with under separate provisions in the Block Exemption.

In particular, the situation we have in mind is where our client asks a third party (a rival services supplier) to supply a particular service to customers of our client, in circumstances where our client has hitherto provided the customers with that service.

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EC Competition law would prohibit any restriction preventing the outsourced service provider from poaching the customers of our client. The result can be that in return for handing over its customer list, our client's business may wither and die as the outsourced service provider gradually churns the customers over to its own direct account.

This situation is different to sub-contract manufacture, where the sub-contract manufacturer may be required to supply the goods back to our client for our client to sell on to its customers. The sub-contract manufacturer may not even be told who our client's customers are, let alone have an ongoing relationship with them (as is normally the case with the supply of outsourced services).

We feel that a restriction on non-poaching is warranted in the services context, at least in competitive markets when customers may deal with alternative suppliers (should they not wish to remain with our client) and where it is commercially viable for customers to switch suppliers.

Market share thresholds

3. We consider that there is a stronger case for continuing with the block exemptions for horizontal agreements than the Vertical Agreements Block Exemption. Given the investment made in many horizontal cases of collaboration which fall short of a merger and given the absence of a notification regime, the balance seems to be in favour of continuing the safe harbour of block exemption.

We wonder whether the market share thresholds at 20% in the Specialisation Block Exemption and 25% in the R&D Block Exemption on a combined basis for all (competing) parties to the agreement are somewhat on the low side. We have frequently advised that "clean" agreements with slightly higher combined markets shares would benefit from individual exemption.

Subcontract manufacture

4. We find the current spread of provisions dealing with subcontract manufacture complicated to follow. They are split between the Subcontracting Notice, the Technology Transfer Block Exemption ("TTBE") (see paragraph 44 of TTBE Guidelines), The Horizontal Agreements Guidelines (see paragraph 81), and the Specialisation Block Exemption (see Article 2 (5)). Could the provisions be pulled together in one revised Subcontracting Notice?

Definition of competing undertaking

5. We wonder why there are variations between Block Exemptions as to what constitutes a competing undertaking. Under the R&D Block Exemption (Article 2 (12) (and also under the Vertical Agreements Block Exemption – Article 1 (a)) a competing undertaking is one which is an actual or potential supplier in the same product market. However, under the Specialisation Block Exemption, a competing undertaking is one which is active on the relevant market, and that in turn is defined as the relevant product and geographic market. (See article 2 (6) and (7) of the Specialisation Block Exemption). Under the TTBE it is also necessary to take into account the relevant geographic market when deciding whether the parties are competing undertakings (Article 1 (1) (j) (ii) TTBE).

We believe that the correct approach is to consider whether the parties are actual or potential competitors in the relevant product and geographic markets.

Guidance on Information Exchange

6. Given the experience which the Commission and European Courts now have in relation to unlawful exchanges of commercially sensitive information, we feel that the time is right for the Commission to publish guidance on information exchanges. The Commission recently took this step in the context of liner conferences. We believe this guidance to be important in helping avoid inconsistent application of the rules on information exchange by national competition bodies.

Useful provisions

7. Provisions in the R&D and Specialisation Block Exemptions which we consider particularly useful for protecting competition are those prohibiting the fixing of prices charged to third parties¹ and the obligation to supply the contract products to the other parties to the agreement².

Provisions in the Guidelines which we find particularly useful for protecting competition are the need to consider spill over markets and network effects when analysing production agreements.

Distribution and rental services

8. We wonder why distribution and rental services are excluded from the scope of the Specialisation Block Exemption (article 2 (4))?

If you have any queries on the above, please contact Trudy Feaster-Gee of this firm in the first instance.

Yours faithfully

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cc Phil McDonnell

¹ Article 5 (1) (d) R&D Block Exemption and article 5 (1) (a) Specialisation Block Exemption
² Article 3 (5) R&D Block Exemption and article 1 (1) Specialisation Block Exemption