

February 13th 2009

AmCham EU Response to the Commission's public consultation on the review of rules for assessing horizontal cooperation agreements

1. Executive Summary

AmCham EU:

- Invites the Commission to simplify and harmonize the rules and guidance applicable to horizontal cooperation agreements, for example, by adopting a uniform safe harbour threshold under the Block Exemptions and in the Horizontal Cooperation Guidelines of 25% and deleting Articles 6(2) and 6(3) of the R&D Block Exemption and the Specialisation Block Exemption Regulations.
- Calls on the Commission to incorporate into the Horizontal Cooperation Guidelines the analytical framework set out in the Art. 81(3) Guidelines – in particular its discussion of restrictions of competition and ancillary restraints – and to further elaborate on the identification and analysis of efficiencies stemming from integration.
- Invites the Commission to provide more guidance on the circumstances under which foreclosure is likely by revising the Horizontal Cooperation Guidelines in light of in light of the Art. 82 Guidance paper and of the Non-Horizontal Merger Guidelines.
- Calls on the Commission to refocus the factual examples contained in the Horizontal Cooperation Guidelines on the Commission's analytical process rather than outcomes, and to give examples of how more complex cooperation agreements would be analysed.
- Suggests the Commission to extend the definition of “research and development” of the R&D Block Exemption to include “clinical or laboratory research, studies or testing necessary to bring products to the market”.
- Invites the Commission to distinguish more clearly in the Horizontal Cooperation Guidelines the analytical framework used to analyse the potential for distinct types of competitive harm, *e.g.*, monopsony, foreclosure and tacit collusion.
- Underlines the importance to undertake a rigorous consumer welfare analysis and to take into account long run benefits as well as short term benefits in the area of standard setting.
- Suggests the Commission to delete the section on environmental agreements from the Horizontal Cooperation Guidelines.
- Invites the Commission to initiate a dialogue on information exchanges.
- Invites the Commission to provide guidance on the extent to which non-compete provisions can be regarded as infringing Article 81.

2. Introduction

The American Chamber of Commerce to the European Union (AmCham EU) is the voice of companies of American parentage committed to Europe towards the institutions and governments of the European Union. It aims to ensure a growth-oriented business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Total US investment in Europe amounts to €702 billion, and currently supports over 4.1 million jobs.

EU competition policy regarding restrictive agreements has undergone a rapid and far going transformation over the past decade, in particular with the introduction of Regulation 1/2003 and the adoption by the European Commission (the “Commission”) of a rigorous economics-based approach to analyzing competition issues. AmCham EU welcomes the Commission’s initiative to consult on the functioning of Commission Regulations 2658/2000 and 2659/2000 (the “Specialisation Block Exemption” and the “R&D Block Exemption”, respectively, and the “Block Exemptions”, collectively) and the *Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements* (the “Horizontal Cooperation Guidelines”).

AmCham EU believes that one of the main goals of effective competition policy should be to better align competition law enforcement with the objectives of the Lisbon Agenda, in particular the stimulation of competitiveness, innovation and growth. It should also provide a lean and simple regulatory framework in the spirit of the Commission’s “*Action Programme for reducing administrative burdens in the European Union*” launched in 2007. This is all the more important in a situation of crisis in international financial markets which is affecting the wider economy, hitting businesses and, in turn, households and jobs. In line with the Commission’s Communication “*From financial crisis to recovery: A European framework for action*” of October 29th 2008, one of the priorities of the EU must be to use national and EU competition policy to make markets work better, thereby affording consumers with broader product choices and competition based on price and non-price factors, and taking full advantage of the Single Market. This necessarily entails clear support for innovation and efficiency-enhancing investments. There are a number of important areas in which both the Block Exemptions and the Horizontal Cooperation Guidelines could be improved to encourage innovation and efficiency while ensuring uniform application of Art. 81 by Member State courts and competition authorities.

3. General Comments on the Horizontal Cooperation Guidelines and Block Exemptions

A. Role of the Horizontal Cooperation Guidelines and Block Exemption

The Horizontal Cooperation Guidelines gained increased significance with the introduction of the direct application of Art. 81(3) under Regulation 1/2003. Actively encouraged by the Commission, private parties are increasingly turning to Member State courts to seek redress or resolve disputes in competition cases. Member State judges are increasingly being called

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upon to undertake analyses that were previously reserved to the Commission and national competition authorities. Few of these judges have experience in applying the economic-based analysis required by Art. 81. They are therefore likely to depend heavily on guidance from the Commission, in particular on the Horizontal Cooperation Guidelines. It is therefore imperative that the Horizontal Cooperation Guidelines set out a clear analytical framework to ensure that national judges in courts of general jurisdiction will be able to apply Arts. 81(1) and 81(3) correctly and consistently throughout the European Union.

An additional effect of direct applicability is that block exemption regulations no longer play as vital a role as they did under Regulation 17/62. Agreements that satisfy Art. 81(3) no longer risk automatic invalidity simply because they fall outside of the market share thresholds of a block exemption regulation. Nonetheless, the Block Exemptions continue to play an important role. Given the potential for Art. 81(1) to be applied by Member State courts without extensive competition policy experience, block exemption regulations enhance legal certainty and uniformity of outcomes by creating clear safe harbours.

B. Simplification of the Horizontal Guidelines and Block Exemptions

Taken together, the Horizontal Cooperation Guidelines, the Block Exemptions and other Commission guidance and block exemption regulations present a somewhat fragmented approach to the analysis of horizontal agreements. This makes them at times difficult to apply, particularly where agreements contain elements of a number of conceptual categories (*e.g.*, R&D and technology transfer). It would be helpful to simplify and harmonise this guidance to the extent possible so as to allow for easier assessment of such broader cooperation.

For example, at present, the two block exemptions and the Horizontal Cooperation Guidelines use a range of market share thresholds for safe harbours. For example, under the R&D Block Exemption Regulation, the threshold is 25%. Under the Specialisation Block Exemption Regulation, the threshold is 20%, but in the case of a non-reciprocal specialisation agreement between non-competitors, Commission Regulation 2790/1999 (the “Vertical Agreements Block Exemption”) applies a 30% threshold to the same agreement. The Horizontal Cooperation Guidelines establish a *de facto* safe harbour of 15% for both joint purchasing agreements and commercialisation agreements. There is no explanation for the use of different thresholds, and there does not appear to be any economic justification for using different market share thresholds for different types of horizontal agreements. To the extent that market shares are used as proxies for market power, market power is assumed to derive from the parties’ combined market position, not the category of agreement. Indeed, there is a strong consensus among economists and competition regulators that market power is extremely unlikely to arise at market shares below 25%.

AmCham EU therefore suggests that the safe harbour thresholds under the Block Exemptions and in the Horizontal Cooperation Guidelines be set uniformly at 25%. There is very little risk that the application of a uniform 25% threshold would lead to anticompetitive agreements being shielded from competition law. The Commission and Member State competition authorities retain the power to withdraw the benefit of block exemption regulations in individual cases, and are better placed than national courts to identify the very rare – and

complicated – cases in which market power arises despite shares of a properly defined market below 25%.¹

The Block Exemptions could also be simplified by deleting Arts. 6(2) and (3) of the R&D Block Exemption and the Specialisation Block Exemption. These provisions, which phase out the application of the block exemption regulations where the parties' market shares exceed the thresholds by specific amounts, were introduced as a "safety net" to protect agreements from automatic nullity under art. 81(2) because of market share fluctuations. They are no longer necessary with the adoption of Regulation 1/2003, because the only consequence that attaches to an agreement that initially satisfied the market share thresholds under a block exemption but subsequently exceeds them is that the agreement must be evaluated individually. Given their potential to complicate the application of the Block Exemptions, the Commission may wish to consider deleting them.²

C. Basic Principles for Assessment under Article 81

It would be helpful to expand the discussion of basic principles in Section 1.3 of the Horizontal Cooperation Guidelines by incorporating the analytical framework set out in the *Guidelines on the application of Article 81(3) of the Treaty* (the "Art. 81(3) Guidelines"). In particular, it would be helpful to incorporate into the Horizontal Cooperation Guidelines a discussion of restrictions of competition and ancillary restraints similar to the discussion at paragraphs 17 through 31 of the Art. 81(3) Guidelines. It would also be helpful to develop the analytical framework for evaluating horizontal agreements under Art. 81(3), in particular as regards the identification and analysis of efficiencies. AmCham EU suggests that it would be especially helpful to see further elaboration on the role of integration in giving rise to efficiencies, in order to ensure that courts and other decision makers properly evaluate efficiencies when applying Art. 81(3).

For example, it is not clear from the illustration given at paragraph 157 why an agreement between two competitors, each with a 5% market share, would restrict competition and would not be capable of exemption. Assuming a properly defined relevant product market, it is extremely unlikely that the two companies would be able to exercise market power absent an unusual market structure. Lacking market power, the parties would be subject to effective competition. Under such a situation, it would be irrational for the companies to reduce output

¹ Ultimately, the adoption of a single block exemption regulation for horizontal agreements along the lines of the Vertical Restraints Block Exemption – that would extend to all types of horizontal agreements within the safe harbour – would greatly facilitate the application of Art. 81 to horizontal agreements. However, given that this would require the amendment or replacement of Council Regulation 2821/71, the adoption of a uniform safe harbour in the Horizontal Cooperation Guidelines would be a useful step.

² Arts. 6(2) and 6(3) can potentially lead to situations where similarly situated agreements are treated differently. For example, assume two identical specialisation agreements. In both cases, the market structure is identical and parties to the agreement presently have combined shares of 19%. The only difference is that in one case, the parties' combined market share exceeded 25% for 13 months, in the other it did not. Under the Specialisation Block Exemption, one agreement would be covered by the block exemption, and the other would not, despite both parties having the same market position. It would be simpler and fairer for companies and courts alike to apply the rule that an agreement that otherwise satisfies the criteria for a block exemption is automatically exempted as long as the parties' share is below 25%, and subject to individual assessment whenever the shares exceed 25%.

or increase prices, since they would simply lose sales to competitors. This strongly suggests that the object of the cooperation is to capture efficiencies that neither party could capture independently. Given the presence of strong competition, it is likely that some portion of the cost savings created by the efficiencies would be passed on to consumers. However, the Horizontal Cooperation Guidelines suggest that such an agreement would be illegal, notwithstanding potential consumer benefits. By contrast, if the companies instead entered into a full-function joint venture subject to notification under Council Regulation 139/2004, it would be cleared under the simplified procedure without any need for analysis of affected markets or efficiencies. However, forming a full-function joint venture would entail significantly higher transaction costs than a simple cooperation agreement. If the only legal way to capture the envisaged efficiencies were through the formation of a full-function joint ventures, this could create significant disincentives to capturing small but significant efficiencies that would benefit consumers. AmCham EU therefore suggests that it is important that the Horizontal Cooperation Guidelines make clear that while integration is often the source of efficiencies, parties should not be forced to integrate their operations more than necessary to achieve those efficiencies.

D. Foreclosure

The risk of foreclosure is a recurring topic throughout the Horizontal Cooperation Guidelines. However, The Horizontal Cooperation Guidelines do not give much guidance on the circumstances under which foreclosure is a competition problem. Given the likelihood that many courts that will be called upon to apply the Horizontal Cooperation Guidelines will not have much background in competition law, AmCham EU believes that additional guidance is necessary.

First, AmCham EU believes that the Horizontal Cooperation Guidelines need to provide more guidance regarding the circumstances under which foreclosure is likely. Under the *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings* (the “Non-Horizontal Merger Guidelines”), the decision maker must evaluate both the ability and the incentives of the parties to foreclose competition. In this respect, AmCham EU suggests that this analytical framework is equally applicable to the analysis of horizontal cooperation agreements. Second, AmCham EU believes that the Horizontal Cooperation Guidelines should be revised in line with both the *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings* (the “Art. 82 Guidelines”) and the Non-Horizontal Merger Guidelines to make clear that foreclosure as such does not restrict competition unless the foreclosure puts the foreclosing undertakings “in a position to profitably increase prices to the detriment of consumers.” Indeed, in assessing potential foreclosure effects, it is important to consider whether the conduct will lead to efficiencies that could increase downstream competition.

E. Use of Examples

The use of concrete examples is an important element of effective competition law guidance. The fact patterns given in the examples in the Horizontal Cooperation Guidelines reflect the

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types of real-world situations that companies face. In practice, however, many of the examples in the Horizontal Cooperation Guidelines are difficult to use in practice because of the tension between the desire to provide simple and succinct analysis and the inherently fact-specific nature of competition law analysis.

For instance, many of the examples do not make clear their implicit assumptions about the market structure, creating the impression that market shares of 30% or more automatically confer market power. Although a thorough reading of the Horizontal Cooperation Guidelines and of Art. 81(3) Guidelines makes it clear that market power cannot be assumed simply by reference to market share, there is a risk that many courts will fixate on the examples and find market power where none exists. AmCham EU suggests that the examples could be made more effective by focusing on the questions that the Commission would ask when faced with the fact pattern, rather than the conclusions it would draw. For example, in the fact pattern discussed above, it would be helpful to explain that because of the size of the parties' combined market shares, the Commission would look at various factors that make the potential exercise of market power more or less likely, such as entry barriers and the existence of potential entrants.

In practice, the Horizontal Cooperation Guidelines have been very helpful in assessing simple cooperation agreements, but provide relatively little guidance for assessing more complicated agreements (although in this respect the Art. 81(3) Guidelines have helped significantly to fill the gap). For example, a cooperation agreement in the pharmaceutical industry could easily contain elements of R&D cooperation, specialisation, joint commercialisation and technology transfer. In the defence and transport sectors, consortia agreements often contain elements of all of those factors, plus standard settings. Although clearly, the Horizontal Cooperation Guidelines cannot cover all, or even many, of the more complicated scenarios that arise in practice, they could usefully be further developed to include more factual examples indicating how some the Commission would analyze more complex cooperation arrangements.

4. Specific Categories of Agreements

A. R&D Agreements

AmCham EU believes that the R&D Block Exemption has worked well, but suggests that it should be expanded to explicitly include research and development efforts focused on bringing existing innovations to market – in other words, recognising this development can be just as important as research. For example, many innovations in the pharmaceuticals sector come from small, research-focused companies. Such companies often need to enter into co-development or co-promotion agreements with larger pharmaceuticals companies in order to bring their innovations to market, because they lack the resources or expertise to carry out the clinical trials necessary to secure market authorisations or because they are unable on their own to bear the risk that the product will not make it to market. Without such agreements, many innovations would never be realised, depriving consumers of new and potentially life-saving treatments. Such beneficial joint development ventures are not limited in the context of pharmaceuticals. As currently drafted, the definition of “research and development” at Art. 2(4) of the R&D Block Exemption covers “technical testing of products or services”.

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Although this language arguably covers co-development and co-promotion agreements, it would be helpful to make explicit that such agreements are covered under the R&D Block Exemption. AmCham EU therefore suggests the Commission extend the definition of “research and development” in Art. 2(4) of the R&D Block Exemption to include “clinical or laboratory research, studies or testing necessary to bring products to market”.

AmCham EU also invites the Commission to reconsider its analysis of Example 1 in paragraph 75 of the Horizontal Cooperation Guidelines. In that example, Companies A and B, which are the only competitors in the market capable of undertaking R&D investment, pool their efforts to develop a new product. The Commission raises the concern that “[s]ince they would face no competition at the R&D level, their incentive to pursue new technology at a high pace could be severely reduced.” The Commission goes on to note that “some of these concerns could be remedied by requiring the parties to license key know-how to third parties on reasonable terms”. This statement runs contrary to the strong consensus among economists that compulsory licensing usually decreases the licensor’s incentives to innovate. In addition, the statement could be interpreted as creating a presumption of anticompetitive effect from the described conduct, while in fact that conduct could, and very well likely may, have the contrary effect and create efficiencies that are pro-competitive. The Commission’s revision of this Example, therefore, should make it clear that an effects-based test of the conduct would be necessary to determine the likelihood of any anticompetitive effects.

B. Joint Purchasing Agreements

Joint purchasing agreements are usually pro-competitive, but in some cases can give rise to three different types of competitive harms: Monopsony, foreclosure and tacit collusion. Each type of harm requires a different analytical framework. It would be helpful if the Horizontal Cooperation Guidelines distinguishes more clearly between the different analytical frameworks. For example, the Horizontal Cooperation Guidelines state at paragraph 126 that “[t]he starting point for the analysis is the examination of the parties’ buying power.” This is true where the concern is monopsony or foreclosure. However, where the concern is downstream tacit collusion, in general only the market share on the downstream market is relevant to the analysis.

Similarly, this discussion in paragraph 128 combines a number of distinct concepts, such as incentives to pass through cost savings and the potential for joint purchasing agreements to facilitate tacit collusion. These concepts would be better dealt with separately. It would also be helpful to discuss more fully the requirements for tacit collusion. For example, paragraph 128 states correctly that large market shares and high commonality of costs may make coordinated behaviour more likely. However, this is not the end of the analysis. It is still necessary to consider whether it would be possible at all for coordinated behaviour to be viable. This requires an analysis of whether the joint purchasing agreement would make it possible for competitors to reach consensus on price, monitor compliance with the consensus, and punish deviations from the consensus. This analysis is not addressed in the Horizontal Cooperation Guidelines.

C. Standards Agreements

Standards agreements are a critical element in driving innovation and fostering competition. In its recent Communication “Towards an increased contribution from standards and innovation in Europe” (COM(2008)133 final), the Commission emphasised that standardisation needs to play a stronger role in support of innovation in an effort to address economic, environmental and social challenges. However, standard setting is a dynamic area and the Commission is currently reviewing how standardisation policy could adapt to changing standardisation models. As a result, the review of Horizontal Cooperation Guidelines should be consistent with the Commission’s standardisation policy and of the objective of fostering R&D, innovation and investment and therefore competitiveness.

Agreements on standards, especially where formal standard setting organisations are concerned, should be considered in the light of the above objectives. The policies of the major standard setting groups promote these objectives through open, inclusive and flexible approaches that reflect the dynamic nature of standards development and balance the interests of all participants in that process, including technology innovators, implementers and vertically integrated firms that both develop and implement the standard.

Both standards agreements and the processes by which they are adopted and implemented are often complex. Indeed, there is no clear consensus on what actually constitutes a “standard”. Competition regulators in both the EU and in the US have been rightly cautious about enforcement actions that may affect the future of standard setting. In conjunction with the Commission’s informal guidance European standards bodies have shown that they are able to elaborate effective rules to prevent market distortion. However, due to the evolving nature of standard setting policy and standards, the Horizontal Cooperation Guidelines remain of great importance to standard setting endeavors and need to remain general in nature so as not to restrict the evolution of standardisation, discourage innovative contributions to standards setting, or to prejudge legitimate commercial activity. Such an approach would also best accommodate the diverse interests involved in standardisation, and all of the myriad business strategies and models of firms participating in standardisation efforts.

At the same time, the Guidelines should make it clear that agreements and standards bodies cannot be used as a vehicle for excluding competition, therefore the text in paragraph 165 of the current guidelines should be retained in the revised guidelines currently under consideration. AmCham EU suggests that the Commission consider expanding Paragraph 165 of the Guidelines and the Examples in the Standards section to describe in more detail the circumstances in which standards agreements are likely to infringe Art. 81(1) by object. Obviously, the discussion will need to be carefully tailored to ensure that it is unambiguous and distinguishes clearly between hard core restrictions and restrictions that may be capable of exemption under Art. 81(3).

In sum, great care must be taken to ensure that the competition rules do not inadvertently inhibit innovation or discourage conduct that may result in significant consumer benefits and overall economic growth. In the standard setting context it is particularly important to undertake a rigorous consumer welfare analysis, taking into account long-run benefits as well

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as short term benefits. Competition rules must, therefore, be used judiciously when balancing the divergent stakeholder interests and should focus upon conduct that has an objectively demonstrable anticompetitive effect. Failing this, there is a risk that incentives for innovative investment will be reduced.

D. Environmental Agreements

In the fight against climate change, it is essential that the European Union should continue to muster strong support for the deployment of green technologies and increase its efforts to encourage innovation in these technologies. AmCham EU believes that, if properly enforced, the competition rules will foster the innovation necessary to find solutions to the challenges faced by climate change and scarce resources. The Horizontal Cooperation Guidelines identify a distinct category of “environmental agreements” that are somehow different from other horizontal cooperation agreements because they involve an environmental objective. There does not appear to be any economic basis for this distinction, given that the competition issues raised by environmental agreements are essentially the issues that have already been addressed in the rest of the Horizontal Cooperation Guidelines. Furthermore, there is no clear definition provided of “environmental agreements” in the Horizontal Cooperation Guidelines, which is unsatisfactory as this leads to legal uncertainty and parties will be unable to assess whether these agreements will be covered or not. AmCham EU is concerned that the section on environmental agreements could be interpreted to suggest that factors other than the four conditions enumerated by Art. 81(3) may be used to exempt otherwise anticompetitive agreements. AmCham EU therefore suggests that the section on environmental agreements be deleted.

5. Issues Not Addressed by the Guidelines of Block Exemption

AmCham EU welcome’s the Commission invitation to raise additional issues for review. As the Questionnaire already suggests, AmCham EU believes that information exchanges are an area where further discussion and guidance would be helpful. In addition, AmCham EU believes that further guidance regarding non-compete provisions would be useful.

A. Information Exchanges

Issues of information exchanges between competitors arise frequently in a wide range of situations. Unfortunately, there is very little useful guidance in this area. Although the recent Guidelines on the application of Article 81 to maritime transport services synthesise the existing precedent, the precedent itself is either old or focused on the requirements for proving concerted practices in cartel cases. The precedent does not address the transformation of the business world by information technology over the past two decades and does not take into account current economic literature. AmCham EU therefore invites the Commission to initiate a dialogue on information exchanges, perhaps by preparing a discussion paper with a view to eventually publishing formal guidance on information exchanges, including the identification of safe harbours.

B. Non-Compete Obligations

The Horizontal Cooperation Guidelines could usefully provide guidance on the extent to which non-compete provisions will be regarded as infringing Article 81, both at a general level, and also where individual types of cooperation are discussed. Although the Art. 81(3) Guidelines discuss ancillary restraints conceptually, it would be helpful to have additional guidance with respect to their concrete application.

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