

**RESPONSE TO THE EUROPEAN COMMISSION'S QUESTIONNAIRE ON
THE CURRENT REGIME FOR THE ASSESSMENT OF HORIZONTAL
COOPERATION AGREEMENTS**

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1. INTRODUCTION

1.1 Freshfields Bruckhaus Deringer welcomes the opportunity to respond to the European Commission's questionnaire on its current rules and policy on the assessment of horizontal cooperation agreements, namely Commission Regulations 2658/2000 and 2659/2000 exempting respectively certain categories of specialisation and R&D agreements, and the Commission Guidelines on the applicability of Article 81 of the Treaty to horizontal cooperation agreements.

1.2 Our comments are based on our significant expertise in advising on issues raised by horizontal cooperation agreements of many types, and in particular complex non-full function joint ventures and joint purchasing arrangements.

1.3 The comments contained in this paper are those of Freshfields Bruckhaus Deringer and do not represent the views of any of our individual clients.

1.4 We are aware that in-house counsel of many of our clients find the Regulations and Guidelines very helpful, and so do we to the extent that we are asked to look at fairly straightforward types of commercial arrangements. However, our experience has been that the majority of horizontal cooperation agreements upon which we are called to advise do not fall within the scope of the relevant block exemptions. In addition, in most of these cases, although the Guidelines provide a starting point for analysis, we consider that, in general, they do not provide sufficient guidance.

1.5 We have therefore limited our responses to a few general substantive comments, suggesting ways in which the existing texts could be developed so as to provide either exemption or more guidance for a broader range of agreements, and in particular the more complex types of agreement.

2. FURTHER DEVELOPMENT OF A GENERAL FRAMEWORK FOR ANALYSIS

2.1 The Guidelines are generally clear and helpful, and we use them most often when looking at non-full function joint ventures and joint purchasing arrangements. However, as currently drafted they normally provide only a starting point for analysing the kind of complex arrangements that we tend to deal with. This limitation is expressly recognised in para. 11 of the Guidelines, which are said to exclude "more complex arrangements such as strategic alliances that combine a number of different areas and instruments of cooperation", although these are also recognised as potentially generating efficiency gains. While it is understandable that guidelines

cannot cover all, or even many, of the more complicated scenarios that arise in practice, they could usefully be further developed in several ways so as to provide more assistance in such cases.

2.2 Firstly, an initial section dealing more fully with the general principles applicable would be very helpful. As currently drafted the Guidelines begin almost immediately with rules applicable to individual types of horizontal agreements, but without setting out a detailed overall framework for analysis. A more detailed section providing this kind of framework, such as appears in the Commission's Guidelines on Vertical Restraints, would be very useful. The joint DOJ and FTC Antitrust Guidelines for Collaborations Among Competitors provide a good model for such general guidance on horizontal cooperation issues.

2.3 In addition, more examples could be included, in particular some indicating how some specific complex cooperation arrangements would be analysed by the Commission, together with full explanation of the reasoning.

2.4 The guidelines could also be further improved by putting more emphasis on arrangements that are unproblematic from the point of view of Article 81 (either falling outside the scope of 81(1) or fulfilling the conditions of 81(3)), rather than, as currently, focusing on problems that may arise.

2.5 With regard to the indispensability test under Article 81(3), the analytical framework should make clear that, when making the assessment of whether there are less restrictive alternatives, only the alternatives that are practical in the business situation faced by the parties will be taken into account, and not theoretically less restrictive alternatives that are not realistic given business realities. It would also be helpful to emphasise the relevance of the specific market circumstances in this context.

2.6 All these points are particularly important in the light of the fact that the Guidelines provide guidance not just to private parties, but also to national authorities and national courts which use them when such arrangements come before them, and which would benefit from a clear indication both of the types of arrangement that do not raise significant Article 81 issues, as well as of those that are problematic from a competition law perspective.

2.7 Finally, we would make a general observation, which is not specific to these rules, but which flows from the directly effective nature of Articles 81 (1) and (3) and the consequent need to carry out 'self assessment', and from the changing nature of the relevant markets, but which is of particular importance in the area of horizontal cooperation. In the case of joint ventures or other cooperation arrangements requiring significant investment in new (joint) production facilities and fundamental strategic decisions, parties normally need a significant level of long term legal security to

justify their commercial decisions. In many markets, and in particular in the kind of innovation markets that are often the subject of such cooperation, market shares fluctuate very significantly over time. This seriously limits the certainty that can be provided by a system based on market share thresholds. While we recognize that it is difficult in this context to find a better proxy for market power than market share, we think that this does point up the very great importance of setting the market share thresholds as high as possible in the horizontal cooperation rules. We therefore recommend that serious consideration be given to raising the existing thresholds set out in the two block exemption Regulations and in the Guidelines.

3. ADDITIONAL AREAS THAT THE GUIDELINES MIGHT COVER

3.1 The Guidelines could also be improved by the addition of 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. Ancillary restraints are currently dealt in the Commission's Article 81(3) Guidelines, but only very briefly. (The Commission Guidelines dealing with ancillary restraints in the context of merger review are of limited assistance outside the merger context, given that ancillary restraints in non-full function joint ventures can be expected to be more difficult to justify, because of the reduced level of commitment involved in comparison with a merger.)

3.2 Specific types of horizontal cooperation not currently covered in the guidelines could usefully be included: e.g. information exchange, B2B agreements and patent settlements.

4. BROADER AND/OR ADDITIONAL BLOCK EXEMPTION REGULATIONS

4.1 The two block exemptions themselves are narrow in scope in terms of the types of agreement that they cover, and so only benefit simple types of arrangement, which in practice we rarely come across. However, we are well aware that they are widely valued, not least by in-house counsel who are frequently required quickly to give a view on relatively routine questions of this sort.

4.2 It may be that additional block exemptions, covering types of agreement other than R&D and specialisation, could be useful. However, we appreciate that the legal basis for these regulations is Council Reg.2821/71, which extends only to R&D, specialisation and standardisation agreements. Given that the Commission does not currently have the power to adopt new block exemptions in other areas, and that that power would therefore have to be sought from the Council, it is clearly only appropriate for the Commission to seek a mandate for the adoption of new block exemptions in other areas where there is a strong case justifying this.