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RESPONSE BY WHITE & CASE LLP TO THE EUROPEAN COMMISSION'S QUESTIONNAIRE

Introduction

As a firm actively advising its clients on their R&D and production strategies, White & Case LLP welcomes the opportunity to comment on the Commission's current policy instruments on horizontal agreements.

The R&D and Specialisation Block Exemption Regulations have been a feature of European competition law for several decades, but the Horizontal Guidelines, when introduced eight years ago, were a welcome reminder that agreements falling outside a specific regulation needed to be reviewed in light of their particular circumstances, and the Guidelines offered a means to do this. While we consider that certain features of the Horizontal Guidelines can be improved, the overall concept of having a set of guidelines to assist national courts, companies and their representatives to analyze agreements is a sound one and should be retained. The R&D Block Exemption Regulation, however, unless dramatically overhauled, is of limited value (as we consider that the vast majority of R&D agreements fall outside the Article 81(1) prohibition and do not need to be exempted). The Specialisation Block Exemption Regulation, on the other hand, which we suspect has languished in a relatively calm backwater over the past decade, may become increasingly relevant as companies come to terms with the current harsh economic climate. Accordingly, this instrument may need to be revisited bearing the prevailing economic difficulties in mind.

Set out below are our more detailed comments.¹

The R&D Block Exemption Regulation

The R&D Block Exemption Regulation has number of important weaknesses. *First*, the overall approach is too timid. While the Commission acknowledges that "agreements on the joint execution of research work or the joint development of results of the research, up to but not including the stage of industrial application, generally do not fall within Article 81(1) of the Treaty," it is unduly conservative when the otherwise legitimate joint research leads to

¹ Please note that these comments reflect the views of the Brussels office of White & Case LLP and do not represent those of the Firm or of its clients. Please also note that we consider it more helpful to provide one global set of comments for each instrument, rather than responding to the questions one-by-one.

collaboration during the exploitation phase.² Such a cautious approach seems misplaced for R&D agreements, the benefits to society of which are evident. We would submit that the Commission should be bolder and be prepared to offer a broader safety net, from which it can subsequently remove any “sham” R&D agreements that disguise a genuine anti-competitive object or effect. The general approach should be one of regulatory forbearance: parties to a *bona fide* R&D agreement should be free to organize the joint exploitation of any results as they see fit, free from detailed rules that seek to straitjacket their future exploitation of results (which in many instances may never occur).

Second, and illustrative of the first point, the pre-conditions for applying the Regulation set out in Article 3 are unduly prescriptive. Through these pre-conditions, the Commission, presumably, seeks, among other things, to encourage intra-brand competition by ensuring that both parties to a pure R&D agreement are free to exploit the results.³ Such a goal, presumably designed to protect one of the parties to the collaboration, applies irrespective of the parties’ market shares. In our view, such a safeguard is without merit if sufficient competition exists on the market. In most collaborations, some participants are better placed to undertake certain tasks in specific areas than others. Let the parties work this out for themselves and allocate revenue and responsibilities accordingly. There is no reason why the parties should not benefit from the Regulation’s safe haven simply because one party is nominated as the entity that will exploit the results of a successful collaboration.

Also, the apparent exclusion of field-of-use divisions between competitors in Article 3(3) is hard to understand in a situation where, but for the collaboration, there would be no new applications to exploit. As noted above, sham agreements whereby the parties use the collaboration as a pretext to carve up markets can be dealt with through the withdrawal procedure laid down in Article 7 (and we would be surprised if the Commission has come across many such agreements in practice).

In addition, Article 3(5) unduly interferes with the contractual relationships of the parties. There appears to be no reason why the Regulation should stipulate that undertakings charged with manufacture by way of specialisation in production are required to fulfil orders for supplies from all parties.

Third, while there are some differences in the treatment of agreements between competitors and non-competitors, these are minor (unlike, say, the Technology Transfer Regulation). Our basic premise is that agreements between non-competitors are almost always pro-competitive. Accordingly, they should not be saddled with unnecessary conditions. In instances where parties bring complementary skills to bear to create something new, they should be free to exploit the results as they see fit. At the risk of repetition, but for this collaboration, there would be no new product and perhaps no new market if the product is sufficiently innovative. Attempts by the Regulation to modify the parties’ conduct *ex post*, once the product is launched, are unhelpful; indeed, they have the potential to hamper innovation.

Fourth, and related to the above, the seven-year rule contained in Articles 4(1) and 5(1)(e) is too prescriptive. In addition, there is an unfortunate ambiguity created by Article 5(1)(e) of

² Recital 9 provides, “The benefit of the block exemption should be limited to those agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 81(3).”

³ Article 3(3) provides, “each party must be free independently to exploit the results of the joint research and development and any pre-existing know-how necessary for the purposes of such exploitation.”

the Regulation and the definition of “jointly” in Article 2(11) of the Regulation. Article 2(11) seems to suggest that it is permissible to allocate responsibility for distribution of a jointly developed product between the parties (e.g. “we exploit the new product in Estonia, you take Russia”). However, Article 5(1)(e) suggests that any attempt to keep the company with the distribution rights in Russia out of the Estonian market for longer than seven years is not permitted; worse, the provision is black-listed (this would be especially harsh if the Estonian distributor is not entitled to sell into Russia). Paragraph 77 of the Horizontal Guidelines, on the other hand, provides that “[the seven-year rule] does not exclude the possibility that a period of more than 7 years also meets the criteria of Article 81(3) if it can be shown to be a minimum period of time necessary to guarantee an adequate return of the investment involved.” At a minimum, to avoid any possible confusion, Article 5(1)(e) should be a “grey” clause (along the lines of Article 5 of the Technology Transfer Regulation), since for markets in which the R&D costs are significant, a longer period may be required to ensure an “adequate” return. This is especially valid where the parties were not competitors from the outset.

Finally, and more generally, the black-listed clauses need to be pared down in light of Article 4(1) of the Technology Transfer Regulation. If the new Regulation does cover agreements between non-competitors, there should be a shorter list equivalent to Article 4(2) of the Technology Transfer Regulation.

Specialisation Block Exemption Regulation

We suspect that this Regulation may become a more prominent feature of the competition law landscape in light of the current economic turmoil. In this regard, a few possible suggestions would be as follows:

- Increasing the market share threshold in Article 4 to at least 25%; and
- Amending Article 6 accordingly.

Horizontal Guidelines

We generally find the Horizontal Guidelines a helpful working tool. We consider that the examples offered are particularly useful. Therefore, we would encourage the Commission to retain its practice and to consider adding **further examples** where appropriate. We suggest it may be helpful to provide more guidance in the grey areas, such as more complex arrangements involving several forms of cooperation (e.g. R&D, production and distribution).

The Guidelines (and the specialisation agreements section in particular) should also be updated to take account of recent case law developments, including the CFI’s 2006 judgment in *O2*.⁴ Thus, the Guidelines should specify that a restrictive effect of the agreement should be assessed under Article 81(1) EC **taking into account the competition situation that would exist in the absence of the agreement** and that Article 81(1) EC would not apply where *the agreement seems necessary for the penetration of a new area by an undertaking*.

The Guidelines are particularly useful in establishing those situations where cooperation between undertakings does *not* fall under Article 81(1) EC. In this respect, we would welcome a clarification of **the notion of “competitor”** as set out in footnotes 8 and 9. In particular, the notion of a potential competitor (footnote 9) refers to an entry period of a

⁴ *O2 (Germany) GmbH v Commission*, Case T-328/03.

maximum of one year (in line with the Vertical Restrictions Guidelines). However, the Guidelines allow longer periods to be taken into account in individual cases; previous Commission decisions show a willingness to accept even a 2-3 year time lag. We believe that a one-year time period provides an appropriate yardstick for the horizontal arrangement analysis and that any departure from such short a time frame should only be justified on the basis of strong evidence.

Under the Horizontal Co-operation Guidelines, market power, market concentration and barriers to entry are put forward as key criteria for assessing whether an agreement comes under Article 81(1) EC. At paragraph 24, the Commission even indicates that categories of co-operation which do not usually fall under Article 81(1) EC could do so if they involve firms with significant market power and are likely to cause foreclosure problems vis-à-vis third parties. In the Commission's decision in *O2*,⁵ the parties enjoyed some power on the relevant market and the Commission acknowledged that the agreement could potentially foreclose third parties in some specific areas. However, instead of concluding that it fell under Article 81(1) EC and analyzing it under Article 81(3) EC, the Commission relied on **the existence of regulatory remedies** to conclude that there was no restriction of competition. We would therefore welcome if the Guidelines could clarify that when an agreement or a clause in an agreement has a potential anti-competitive effect, it may in certain cases fall outside Article 81(1) EC if that potential effect can be remedied by a specific regulatory measure.

The Guidelines appear to rely heavily on **market-share presumptions** to grant an exemption from the Article 81(1) prohibition. These presumptions, while imperfectly reflecting competitive dynamics and dependent on accurate market definition, provide cooperating undertakings with some degree of comfort. We would suggest that in line with the changes to the *De Minimis* Regulation, they are increased by at least 5%. Accordingly, we submit that the threshold for commercialisation and joint purchasing should be increased by 5% to 20%, for specialization to 25% and for R&D to 30%.

As part of the Modernisation Package, the Commission adopted the Article 81(3) EC Guidelines which set out in detail the Commission's view on the applicability of the four Article 81(3) criteria. In contrast, the Horizontal Guidelines do not contain such detail. Therefore, it could be beneficial in terms of the Horizontal Guidelines' structure if the general part (Section 1.3.2) were removed and replaced with individual sections devoted to specific agreements that dovetail with the Article 81(3) Guidelines. Some parts of Section 1.3.2 have already been overtaken by the Court's case law and the Article 81(3) Guidelines, e.g. para. 36.⁶

We welcome the current expanded section on **joint production**. This section is frequently used in practice to inform undertakings about the Commission's view on capacity-enhancing projects. That said, we would welcome clarification of para. 90, which establishes very narrow exceptions from Article 81(1) EC (price determination). We would argue that the Commission should consider additional situations that would merit the parties' closer cooperation on price, especially if price is benchmarked against objective market indicators.

⁵ Case COMP/38.370 – *O2 UK Limited/T-Mobile UK, Limited (UK Network Sharing Agreement)*, Commission Decision 2003/570/EC.

⁶ The Court in *TACA, Atlantic Container Line AB*, CFI September 30, 2003, T-191/98 clarified that Article 81(3) EC can apply to agreements involving dominant companies.

Furthermore, we suggest that the use of an example to support the current para. 90 would facilitate a clearer understanding of the permissible exceptions.

The **joint purchasing section** currently envisages the possibility for SMEs to take advantage of combined volumes and discounts (para. 116). We would propose to expand this point as well as considering a more relaxed treatment of purchasing agreements between larger organisations. In such situations, although purchasers would arguably enjoy a high degree of buyer power, this would be outweighed by the sellers' market power and economies of scale deriving from joint purchasing.

Despite the Commission's stated intention, no **information exchange** guidelines have been adopted to date. We would welcome an initiative from the Commission in this field. This is particularly important in light of the close scrutiny of the activities of trade associations and other commercial groupings between competitors. While the case law of both the Court and the Commission provides some general guidance, undertakings and their counsel often find themselves in uncharted territory when trying to assess the level of aggregation and/or historical nature of specific information to avoid the pitfalls. With fines reaching criminal proportions in this area, it is incumbent on the Commission to offer clarity in the form of a simple list of do's and don'ts. Furthermore, additional guidance would be extremely helpful with regard to permissible types of information exchange in the context of M&A transactions.

While we are of the view that the **standard-setting** process is, on the whole, pro-competitive, there may be situations where lack of openness, for example the exclusion of certain types of participants, may create difficulties. This is highlighted in the Commission's Technology Transfer Guidelines at ¶231,⁷ but is not reproduced in the Guidelines. For reasons of completeness, it may be appropriate to bring the two sets of Guidelines into line in this regard.

As noted above, we welcome the guidance offered by the Horizontal Guidelines and consider that the examples offered therein are the most helpful element. We would therefore encourage the Commission to retain this approach and provide further examples where appropriate.

⁷ "When participation in a standard and pool creation process is open to all interested parties representing different interests it is more likely that technologies for inclusion into the pool are selected on the basis of price/quality considerations than when the pool is set up by a limited group of technology owners. Similarly, when the relevant bodies of the pool are composed of persons representing different interests, it is more likely that licensing terms and conditions, including royalties, will be open and non-discriminatory and reflect the value of the licensed technology than when the pool is controlled by licensor representatives."