

**RESPONSE TO THE
EUROPEAN COMMISSION**

*Draft revised rules for the assessment of horizontal
co-operation agreements*

ALLEN & OVERY
ALLEN & OVERY LLP

TABLE OF CONTENTS

1.	Introduction.....	1
2.	The Draft Horizontal Guidelines.....	1
▪	<i>Basic assessment framework</i>	1
▪	<i>Information exchange</i>	3
▪	<i>Standardisation Agreements</i>	5
3.	R&D BER.....	8
▪	<i>New definitions</i>	8
▪	<i>Conditions for exemption</i>	8
4.	CONCLUSION.....	8

1. INTRODUCTION

1.1 We welcome the opportunity to comment on the European Commission's (the **Commission**) revised rules for the assessment of horizontal co-operation agreements under European Union competition law as provided in the draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (the **Draft Horizontal Guidelines**), the draft Commission Regulation on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of research and development agreements (the **Draft R&D BER**) and the draft Commission Regulation on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of specialisation agreements (the **Draft Specialisation BER**).

1.2 In this document we provide our comments on the most substantial changes proposed by the Commission in the Draft Horizontal Guidelines, in particular on the following:

- (i) the basic assessment framework as set out in the Introduction;
- (ii) the chapter on general principles on the competition assessment of information exchange; and
- (iii) the chapter on standardisation agreements (standard setting agreements) notably in the context of intellectual property rights (**IPRs**).

1.3 We also provide brief comments on the Draft R&D BER.

2. THE DRAFT HORIZONTAL GUIDELINES

▪ *Basic assessment framework*

Purpose and scope

2.1 Under the heading of "Purpose and scope", the Commission sets out the general application of the Draft Horizontal Guidelines and emphasises that the analysis of horizontal co-operation agreements must be carried out on the basis of legal and economic criteria. In this subsection, the Commission seeks to provide guidance on, *inter alia*, its definition of "competitors", its approach to joint ventures and the application of the Draft Horizontal Guidelines on the basis of the most upstream indispensable building block.

2.2 In paragraph 10 of the Draft Horizontal Guidelines, the Commission discusses the use of the term "competitors". In this regard, the Commission states that it will treat a company as a "*potential competitor of another company if, absent the agreement, in case of a small but permanent increase in relative prices, it is likely that this first company, within a short period of time, would undertake the necessary additional investments or other necessary switching costs to enter the relevant market on which the other company is active*" (emphasis added).

2.3 We recommend that the Commission clarifies what is meant by "a short period of time". In the context of merger review, the Commission sets out that entry into the market is usually considered as timely if that entry occurs within a period of two years¹. We ask that the Commission clarifies whether this two year period in the context of merger review will also apply to horizontal co-operation agreements.

¹ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings – paragraph 74.

- 2.4 In the following paragraph (11), the Commission sets out its intended approach to the relationship between joint ventures and their parent undertakings. In particular, the Commission states that "*Article 101 does not apply to agreements between the parents and such a joint venture, provided the creation of the joint venture did not infringe EU competition law*". Whilst we welcome this clarification, we would ask that the Commission confirms that this statement relates to full function joint ventures, i.e., that Article 101 does not apply to agreements between the parents and a full function joint venture, where the creation of that joint venture did not infringe EU competition law.
- 2.5 In these introductory paragraphs, the Commission also provides guidance on how the Draft Horizontal Guidelines should be applied in cases where horizontal co-operation between competitors includes several stages of co-operation, such as R&D, production and commercialisation. In this regard, the Commission clarifies in paragraphs 11 and 12 that an assessment of the compatibility of the arrangements with Article 101 must start with the assessment of the "most upstream indispensable building block" of the co-operation. This is in contrast to the Commission's previous wording that suggested a focus on the "centre of gravity" of the co-operation. This proposed amendment is welcomed, since in practice the identification of the centre of gravity of the co-operation was not always straightforward.

Basic principles for the assessment under Article 101

- 2.6 In the next subsection of the Introduction, the Commission sets out the basic principles for the assessment of horizontal agreements under Article 101. In paragraph 23, the Commission provides a brief explanation of the concept of "object" restrictions, and refers to the General Guidelines². We question whether it would be helpful, for the benefit of those less familiar with the General Guidelines and EU competition law, to provide in the footnotes to this paragraph at least a repetition of the types of conduct typically considered as being object restrictions. In this regard, the General Guidelines provide that in the case of horizontal agreements, restrictions of competition by object include price fixing, output limitation and the sharing of markets and customers.
- 2.7 With regard to effect restrictions, we note that the Commission provides clarification in paragraph 25, stating that effect restrictions relate to conduct for which there is an "actual or likely" adverse impact on competition. We fully endorse the use of the word "likely" in both this paragraph and in paragraph 26.
- 2.8 However, the Commission appears to use the terms "potential" and "likely" interchangeably, for example, as it does in the preceding paragraph 24. "Potential" as the Commission is aware, is a question of degree, and invites debate. We would support the notion that in assessing restrictions by effect, the test that must be applied is whether adverse impact on competition is more *likely* than not. We recommend that the Commission is consistent with the terminology and use the term "likely", rather than "potential", throughout the Guidelines where appropriate. The Commission should also emphasise in the guidelines the need for a thorough 'effects' based analysis of any alleged anticompetitive practice.³
- 2.9 Further, in paragraph 26, the Draft Horizontal Guidelines state "*for restrictive effects on competition to be likely, they should be expected with a reasonable degree of probability*". This, in our view, is an unhelpful statement that seeks to introduce an assessment of reasonableness when the more rigorous test of "more likely than not" would be more appropriate. This would be in line with the judicial standard of balance of probabilities.
- 2.10 In paragraph 28, the Commission states that Article 101(1) will not apply to horizontal co-operation agreements between competitors that would not be able to independently carry out the project. At the

² Commission Guidelines on the application of Article 81(3) of the Treaty (now Article 101(3) of the Treaty on the Functioning of Europe).
³ For example, we are aware that in France, the Supreme Court has required the Competition Council to concretely analyse the effects on the market rather than merely presume such effects.

end of the paragraph, the Commission adds "*unless they could have carried out the project with less stringent restrictions*". We consider that the insertion of this last caveat confuses the assessment under Article 101(1) and Article 101(3). The assessment of indispensability is not appropriate under Article 101(1) and will put the Commission and national competition authorities in the difficult practical position of second-guessing the judgement of the parties in question, and so we would recommend that this last caveat is deleted.

2.11 Finally, in this section, we welcome the Commission's approach in providing examples on how horizontal co-operation agreements may limit competition (paragraph 32). However, we would recommend that these examples are clarified. The Commission states, for example, that horizontal co-operation agreements may limit competition by affecting the parties' financial interests in such a way that their decision-making independence is appreciably reduced. We would ask the Commission to clarify this statement, as it appears, at first sight, to be very broad.

▪ ***Information exchange***

General remarks

2.12 We welcome the inclusion of a chapter on information exchange. The chapter builds and expands on the guidance already provided in the Commission Guidelines on the application of Article 81 to maritime transport services⁴ to provide general guidance on information exchange, and follows on from developments in the case law of the European Court of Justice.

2.13 We set out below our comments on a few points that we have found to be of interest, or which require clarification.

Assessment under Article 101(1)

2.14 We are interested to see that in paragraphs 65 and 66, the Commission includes anticompetitive foreclosure as one of its main competition concerns arising from information exchange. It would be useful if the Commission could provide examples from its enforcement practice of this type of foreclosure.

2.15 In paragraph 67, under the heading "Restriction of competition by object", the Commission states that information exchange relating to future conduct regarding prices and quantities is particularly likely to lead to a collusive outcome. The Commission then provides, in footnote 46, that "*information regarding intended future quantities could for instance include intended future sales, market shares, territories or customer lists*".

2.16 We consider that the Commission is being too broad in considering that the exchange of intended future sales, market shares, territories or customer lists is a restriction of competition by object. The exchange of market share information, for example, cannot be considered as a restriction of competition by object, since it is unclear how such an exchange could, by its very nature, have the potential of restricting competition. We urge that the Commission revises these examples given in footnote 46.

2.17 In paragraph 68, the Commission sets out the types of information exchange that it will consider as object restrictions under Article 101(1):

- (i) information exchanges between competitors of individualised data regarding intended future prices or quantities;

⁴ Guidelines on the application of Article 81 of the EC Treaty to maritime transport services.

- (ii) information exchanges on current conduct that reveal intention on future behaviour;
- (iii) cases where the combination of different types of data enables the direct deduction of intended future prices or quantities; and
- (iv) other types of information exchange (mainly private individualised exchanges between competitors on price and market shares) the aim of which is to restrict competition on the market.

2.18 While it is welcomed that the Commission seeks to provide guidance on the types of information exchange that fall within the scope of "object" restrictions under Article 101(1), we are concerned that the Commission's approach in paragraph 68 of the Draft Horizontal Guidelines is again too broad and goes beyond the Commission's position in the General Guidelines and current European court case law, especially since no reference is made to the need to consider the underlying facts of the agreement and the characteristics of the market involved.⁵ In this context, it can be questioned whether the examples provided by the Commission in paragraph 68 can be readily qualified as restrictions "by object". Further, by requiring an analysis of the aim of the agreement in the penultimate sentence of the paragraph, the Commission introduces an undesirable subjective element relating to the intention of the parties. As stated in the General Guidelines, evidence of subjective intent on the part of the parties to restrict competition is a relevant factor, but should not be a necessary condition.

2.19 With regard to the guidance on "effects" analysis, we agree with the Commission's proposed assessment insofar as information exchanges require the assessment of the characteristics of the market prior to the information exchange, and the effect of the information exchange on that market. The Commission's paragraphs on market coverage as a basis of assessing the appreciable effects of the information exchange are also welcomed. However, we feel that the Commission should be able to provide greater comfort and clarity as to what market share will typically fall below the concept of "a sufficiently large part of the market" to give rise to appreciable effects on competition.

2.20 Of interest is how the Commission appears to define the term "commercially sensitive information" as "strategically useful data". We do not consider that these two terms are synonymous. The concept of commercial sensitivity relates to how information needs to be treated, in particular, it means that care and caution are required in the sharing or dissemination of such information. The concept of strategic usefulness, on the other hand, relates to the value of the information. Not all information that is strategically useful is also commercially sensitive. In this regard, we would suggest that the Commission provides greater clarity. In addition, it may be helpful for the Commission to point out that the mere fact that parties label information as strategic and/or confidential will not in itself be determinative.

2.21 In relation to public data as referred to in paragraph 82, the Commission suggests that genuinely public information "*is information that is equally easy (i.e., costless) to access for everyone*" and that information that is in the public domain "*is not genuinely public if the costs involved in collecting the data discourage to a sufficient degree other companies and buyers from doing so*". As seen in example 6 to this chapter, this concept of public information is very broad.⁶

2.22 First, we ask that the Commission clarifies what it means by "*equally easy (i.e., costless)... for everyone*" and for the Commission to provide specific examples of the type of information that can

⁵ The strict approach adopted by the Commission also appears out of line with the position in some Member States. For example in France, l'Autorité de la Concurrence has stated in a recent opinion that "*information exchanges between competitors, even those which concern costs or prices are not anti-competitive per se ...*" (unofficial translation). Avis n. 10-A-11 of 7 June 2010 - Conseil interprofessionnel optique.

⁶ It can also be questioned whether this example is a correct reflection of anticompetitive information exchange. The example appears to be very similar to a French Competition Council case (case 03-D-17 of 31 March 2003) where the Paris Court of Appeal found that the information exchange was not restrictive of competition (3 December 2009).

be considered as truly costless, and therefore, genuinely public. Secondly, we ask that the Commission reconsiders the apparent prominence it places on the concept of "costless" since there may be instances where information is readily accessible to all parties, but at a similar cost. Thirdly, we ask that the Commission provides some background as to the policy drivers behind this reasoning. Whilst the reality of the situation is that there may be discomfort about competitors speaking to one another, we question what anticompetitive effects the Commission is trying to prevent by focussing on public and non-public data in this way.

- 2.23 In the paragraph 84, the Commission provides guidance on public/non-public *exchange* of information and states that "*an information exchange is genuinely public if it makes the exchanged data equally accessible to all competitors and buyers*". First, we note that there is some element of overlap between the guidance given here and that given under the preceding paragraphs relating to public/non-public information (paragraphs 82 and 83). We would therefore suggest that both analyses are combined under the heading of public/non-public information. Secondly, the Commission should provide further explanation of how to appropriately assess whether incremental information exchange can tip the market balance towards a collusive outcome. Likewise, we ask for the Commission to provide guidance on how it will address situations where there is only a *partial* public exchange of information, i.e. the parties ensure that some information is placed in the public domain to address the asymmetry.
- 2.24 In paragraph 86, the Commission provides guidance relating to the age of data. It says in this paragraph that data can be considered as historic if it is several times older than the average length of contracts in the industry. We would point out to the Commission that in taking account of the age of the data, relevant time periods can vary enormously from market to market. We would therefore welcome the express recognition that the relevance of the age of the data will be assessed on a case-by-case basis.
- 2.25 In paragraph 87, the Commission indicates that, depending on the structure of the market, an isolated information exchange may be a sufficient basis to reach a collusive outcome contrary to the competition rules. This position reflects the Court of Justice of the EU's judgment in *Case C-8/08, T-Mobile Netherlands*. However, the case appears to be very fact specific and the court appears to have treated the conduct as bordering on cartel behaviour. It should be made clear in the guidelines that the overall context of the information exchange must be taken into account when assessing isolated events (e.g. such as in the *T-mobile* case). Further, the Commission should acknowledge that an isolated exchange of information will only be considered as anti-competitive in very specific circumstances.

- ***Standardisation Agreements***

- General remarks*

- 2.26 We welcome guidance on standardisation agreements and standard setting. This could be provided in a separate document concerning both agreements and unilateral practices. To the extent that it is included in the guidance for horizontal agreements, we do not consider that it is unreasonable that the Commission provides guidance on standards both within the context of Article 101(1) and Article 102 where relevant. Indeed, we believe that it is often inevitable that an assessment of standards may require both an Article 101 and an Article 102 analysis. Having entered such an approach in this Draft Horizontal Guidelines, we would fully encourage the Commission to be detailed and comprehensive.
- 2.27 In relation to the approach to the chapter, for the sake of clarity, we suggest that the Commission considers separating its section on standard terms, and standardisation in the context of standard setting and IPRs.

Main competition concerns

- 2.28 In paragraph 262, the Commission refers to the fact that an essential IPR can confer market power onto an undertaking. We ask that the Commission considers clarifying the use of the term "essential IPR in a standard" in this paragraph. The notion of the "essential" is not a universal concept, and depends very much on the context in which it is applied, especially in a standard setting context.
- 2.29 We do not ask that the Commission provides a specific definition of "essential", but that it acknowledges that the concept of essential IPR in a standard setting context varies from case to case. It would also be helpful if the Commission could provide specific examples in the Guidelines of when an IPR in a standard can be considered to be essential.
- 2.30 Further in paragraph 262, the Commission uses the term "holding-up" as a way by which dominant undertakings can extract excess rents by holding-up essential IPRs in a standard. We would find it useful if the Commission could provide further guidance on the concept of "holding-up" and provides some examples of this.

Restriction of competition by object

- 2.31 Generally, in our view restrictions by object should be limited to the most blatant and harmful breaches of competition rules. The very fact that one can debate whether or not an example given by the Commission are object restrictions or not, indicates to us that these practices should not be listed under the category of object restrictions in a Commission guidance paper. Examples given under the object restrictions category should be so convincing that no debate on its anticompetitive effects should be necessary.
- 2.32 We find that the Commission's examples of restrictions of competition by object in paragraphs 266 to 268 to be generally too broad and at times inconsistent with the European court's case law on object restrictions. For example, the Commission states in paragraph 266 that "*an agreement whereby a national association of manufacturers sets a standard and puts pressure on third parties not to market products that do not comply with the standard*" would be considered to be an object restriction. We consider that whether such an agreement could be a restriction of competition by object or effect is debatable, depending on the circumstances.
- 2.33 Further, in paragraph 267, the Commission states, in its last sentence, that "*prior to the adoption of the standard, agreements by IPR holders on the licensing terms they will disclose will also constitute restrictions of competition by object*". It is unclear how this could affect envisaged patent pool arrangements. We therefore ask for guidance on this point.
- 2.34 Likewise the wording in paragraph 268, where the Commission states that standard terms which "influence the prices" charged to customers will be a restriction of object needs to be reviewed. The notion of influencing prices here is too vague to be applied to a restriction by object.

Restrictive effects on competition

- 2.35 Whilst we welcome the Commission's guidance on the restrictive effects on competition of standardisation agreements, we would ask that the Commission reviews and expands on its use of certain terms and phrases.
- 2.36 First, the Commission introduces in paragraph 282, the concept of fair, reasonable and non-discriminatory terms in relation to essential IPRs (**FRAND** commitment). We would ask that the Commission provides further guidance on what it means by FRAND, and further, what it means by the words "fair" and "reasonable" and the differences between the two concepts. This would also assist in understanding how the concept of FRAND commitments differs from the RAND

commitments (reasonable and non-discriminatory) applied in other jurisdictions. We suggest that further guidance and examples are given to illustrate the Commission's interpretation of these concepts.

- 2.37 In the next paragraph (283), we note that the Commission appears to equate unfair or unreasonable fees outside the FRAND commitment with the notion of excessive fees. We ask that the Commission clarifies whether this means that the Commission will treat FRAND commitment cases essentially as excessive pricing cases.
- 2.38 Secondly, we would ask that the Commission reviews its benchmarking methods under paragraph 284 and 285. In these paragraphs, the Commission describes assessing the value of the patent by carrying out an *ex post* and *ex ante* approach, or by seeking the views of an independent expert. Whilst we recognise that it is difficult to provide guidance on all the benchmarking methods that may be applied, and that the Commission does not seek in these guidelines to provide an exhaustive list of benchmarking methods, we ask that the Commission provides some insight as to other appropriate benchmarking methods it may have considered in its enforcement practice. In this regard, we would also find it useful for the Commission to provide examples of how benchmarking methods may be used to assess whether royalty fees are excessive.
- 2.39 Thirdly, we note that the Commission advocates, in paragraph 286, for a FRAND commitment relating to an IPR to bind subsequent purchasers of that IPR from the point of transfer. We query whether, even if such a transferee agrees to be bound by the original FRAND commitment, such an agreement can be practically enforced against the transferee especially where the seller has exited the relevant market. We would welcome the Commission's further description of how transferring the FRAND commitment in this manner will work to prevent a subsequent breach of that commitment.
- 2.40 Fourthly, we ask that the Commission clarifies the use of the term "inclusion of substitute technologies" in paragraph 288. The Commission states in this paragraph that the inclusion of substitute technologies in a standard is likely to give rise to restrictive effects. We question whether the Commission has in mind that the inclusion of substitute technologies can lead to collusion between two standard holders. We ask that the Commission clarifies this. In particular, we would point out that the addition of a substitute standard may also lead to pro-competitive effects, in particular, where it is intended to overcome deadlocks in a standard setting context.

Assessment under Article 101(3)

- 2.41 Under the heading "efficiency gains", the Commission states that "*the rules of the standard-setting organisation should contact sufficient safeguards to prevent the standard-setting process from being biased toward one or several participants*" (paragraph 301). Whilst we agree with this notion, we would point out that this paragraph may be better suited under the heading "no elimination of competition", rather than under a discussion on efficiencies.
- 2.42 We further question the wording in paragraph 309, where the Commission states that standardisation agreements that make a standard "binding and obligatory for the industry" are not indispensable. First, we ask for clarification on the term "for the industry" in this context. Secondly, we ask that the Commission clarifies what it means by saying that standards that are binding and obligatory are not indispensable. We suggest that if the Commission means to say that standards that restrict other parties from developing competing standards or products (as in example 3 to this chapter) is likely to be a restriction of competition by effect, the Commission should expressly say so.

3. R&D BER

- *New definitions*

3.1 In this section we provide some brief comments on the R&D BER.

3.2 We note that the Commission expands on the definition of "jointly" by stating that R&D can be carried jointly by way of specialisation in research and development, and specialisation in exploitation.

3.3 In relation to specialisation in research and development, the Commission states that both parties must carry out "some" of the research and development and focus on a distinct area of research and development. We ask that the Commission considers providing guidance on what thresholds are applicable in this regard, particularly since the term "some" is vague. Whilst it is expressly stated that specialisation in research and development specifically excludes the situation where one party carries out the research and development and the other party merely finances the activities, it is unclear as to what actual level of participation in research and development is required by both parties. We also ask that the Commission provides guidance as to what it means by "distinct area of research".

3.4 In relation to specialisation in exploitation, we note that the Commission again requires that both parties must carry out some exploitation. We ask that the Commission confirms whether "*some*" includes a situation where such involvement in exploitation is kept to a minimum level, particularly with regard to the requirement that the exploitation is carried out in the internal market. We question, for example, whether minimum exploitation within one territory of a Member State can be considered to meet the criteria provided in this definition.

- *Conditions for exemption*

3.5 We note that the Commission has also inserted some additional requirements to the conditions for exemption in Article 3. Notably, the Commission now requires that the parties agree to disclose all their existing and pending intellectual property rights in as far as they are relevant for the exploitation of the results by the other parties, prior to starting the research and development.

3.6 It appears that the goal of this insertion is to avoid situations of "patent ambush" after the conclusion of the research and development. We note, however, that in the drafting of this statement, the Commission does not require that the disclosure of intellectual property rights is made prior to the conclusion of the research and development *agreement*. Parties may therefore avoid disclosure until after the research and development agreement has been concluded. We query whether this is intentional on the part of the Commission.

3.7 In paragraph 3, the Commission further states that, as a condition for exemption under the block exemption, access must be granted to all parties to the research and development agreement on an equal basis. This is in contrast to the existing wording of the conditions for exemption that makes no mention of equal access. We ask that the Commission clarifies in this sentence what it means by "equal" access.

4. CONCLUSION

4.1 We welcome the Commission's draft revised rules on the assessment of horizontal co-operation agreements. The Commission has clearly sought to provide further clarity in its framework of assessment and provide more examples from its enforcement practice throughout the document.

4.2 We support the Commission's inclusion of the new chapter on information exchange. However, we urge the Commission to consider clarifying certain terms and phrases used, and to consider revising (and limiting) the scope of what it considers to be object restrictions under Article 101(1). We similarly support the inclusion of the new chapter on standardisation and specifically standard setting in the context of IPR. We recognise that these types of agreements must be viewed within the context of IP law and both Article 101 and Article 102. We urge the Commission, therefore, to consider carefully the use of specific concepts such as "essential IPR" in a standard and FRAND commitments and acknowledge that the interpretation of such concepts may vary from situation to situation.

Allen & Overy LLP