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**Horizontal cooperation agreements:**

**comments on the draft revised block exemption regulations and guidelines**

**1. Introduction**

On 4 May 2010 the European Commission published for consultation a set of documents on the application of article 101 of the Treaty on the Functioning of the European Union (TFEU) to horizontal agreements, i.e. agreements between companies operating at the same level in the market. The existing block exemption regulations on research and development agreements (Commission Regulation (EC) no. 2659/2000, “R&D BER”) and on specialisation agreements (Commission Regulation (EC) no. 2658/2000, “Specialisation BER”) will expire on 31 December 2009.

The documents published by the Commission include a draft revised block exemption regulation on R&D, a draft revised block exemption regulation on specialization agreements and draft new Commission Guidelines on the assessment of horizontal cooperation agreements, which should substitute the 2001 Guidelines<sup>1</sup>.

The Commission block exemption regulations on specialization and R&D agreements and the Horizontal Guidelines are crucial components of the system of application of article 101. In fact, in order to compete in evolving markets, companies may find it efficient to integrate their activities through mergers or to collaborate through looser forms of integration, i.e. cooperation agreements. Horizontal cooperation agreements are widespread and represent an important instrument to reduce costs, improve quality, promote innovation and enter into new markets. However, under some circumstances, horizontal cooperation agreements can restrict competition with a negative market impact on prices, output, innovation or the variety or quality of products and therefore should be prohibited by competition law.

Ideally, the substantive criteria of application of article 101 to horizontal cooperation agreements should be able to deter anticompetitive horizontal agreements without

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<sup>1</sup>2001/C 3/02.

discouraging innocuous or even pro-competitive arrangements. Chilling effects must be avoided.

The Commission notices on the substantive criteria of application of competition rules should ensure overall coherence in the treatment of unilateral conduct, agreements and mergers.

Moreover, a proper mix of an impact based assessment, aimed at minimizing errors, and simplicity and predictability of the regulatory framework has to be looked for. This is especially true in the modernization system established by (EC) Council Regulation no. 1/2003, in which undertakings must self-assess the compatibility of their agreements with article 101. The modernization package contemplated the possibility for the Commission to provide guidance in individual cases, but so far this possibility has not been exploited. Probably, the requirements contained in the 2004 Commission Notice on individual guidance are too narrow and should be reconsidered<sup>2</sup>. In the meantime, the Commission can use the Guidelines to help undertakings self-assess whether an agreement which they consider potentially profitable would be compatible with competition rules. The Guidelines should not only provide national competition authorities and complainants with the indication of the possible scenarios in which a horizontal agreement may restrict competition, but also give undertakings guidance on the conditions under which it can normally be excluded that a significant anticompetitive impact will occur. Although in exceptional cases a negative impact can also emerge from a non standard combination of circumstances, it would be helpful that the Guidelines focus on the most plausible anticompetitive scenarios. The risk of an exhaustive list of all possible anticompetitive stories is that they will be viewed by undertakings as been considered equally dangerous by the Commission, with a chilling effect.

The distinction between restrictions of competition by object and restrictions of competition by effect plays a major role in the application of article 101 and is therefore recalled in the draft Guidelines. Restrictions by object are those that by their very nature have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying article 101(1) to demonstrate any actual effects on the market<sup>3</sup>. In principle, agreements should not be considered restrictive by object independently of their anticompetitive impact, but precisely because they are so unlikely to be pro-competitive and so likely to have a highly negative impact on the market that a prohibition under article 101(1) without a detailed inquiry has no significant negative consequence on the operation of markets. Although the case-law does not completely eliminate the possibility of an assessment under article 101(1) (“restrictions by object should be assessed within their legal and economic context”), it is clear that undertakings will avoid arrangements which are qualified as restrictions by object by the

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<sup>2</sup> 2004/C 101/6.

<sup>3</sup> Guidelines on the application of article 101(3), paragraphs 21-23.

Commission. While for cartels a restriction-by-object approach is widely accepted, any broadening of the category of restrictions by object to arrangements which in a significant number of cases may not have any anticompetitive impact, should be cautiously evaluated from a policy perspective. For instance, for information exchanges among competitors it seems useful to remind that there may be pro-competitive justifications which make a restriction-by-effect approach more suitable than a restriction-by-object approach<sup>4</sup>.

In the following we provide some specific comments on the two draft BERs and on the draft Horizontal Guidelines.

## **2. Draft R&D block exemption regulation**

### ***Notion of potential competitor***

The market share threshold applies only to agreements between actual or potential competitors. The draft R&D BER contains a new definition of potential competitor. Pursuant to article 1, paragraph 16, a potential competitor is an undertaking that in the absence of the agreement would be likely to enter the market within not more than three years. It is doubtful that the reference to the three years period represents an improvement. This time-frame can be extremely long for the most dynamic industries. Moreover, as a consequence of the adoption of this special notion, there would be different definitions of “potential competitor” in the different areas of EU competition law. In the Vertical Guidelines, for instance, the relevant period is one year<sup>5</sup>. This certainly would not contribute to the simplicity of the legal framework. It would seem preferable to refer also in this context to the notion used in the vertical package.

### ***Prior disclosure of IPRs***

Article 3 of the draft BER provides that the block exemption applies only if the parties agree that prior to starting the R&D they will disclose all their existing and pending IPRs which are relevant for the exploitation of the results by the other parties. The Commission aims at

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<sup>4</sup> Dennis Carlton, Robert Gertner and Andrew Rosenfield (1997), *Communication among competitors: game theory and antitrust*, *George Mason Law Review*, vol. 5, no. 3, 423. See also Alberto Heimler (2009), *The legal significance of economic evidence in antitrust cases: some comments based on the Italian experience*, forthcoming in C.D. Ehlermann and M. Marquis (eds.), *European Competition Law Annual 2009; Evaluation of Evidence and its Judicial Review in Competition Cases*, Hart Publishing, Oxford and Portland.

<sup>5</sup> Commission Guidelines on vertical restraints, 2010/C 130/01, paragraph 27.

encouraging practices which prevent patent ambushes. It justifies this new condition for exemption within an article 101(3) framework, arguing that without prior disclosure the benefits of the joint R&D for consumers might be limited. We suggest to reconsider whether the appropriate reference is to all “relevant” IPRs, or whether it would be more proportionate to refer to the existing and pending IPRs which are “essential” for the exploitation of results.

#### ***Hardcore restrictions becoming excluded restrictions***

Pursuant to the draft BER, two restrictions which were previously considered hardcore will become excluded restrictions (the prohibition to challenge the validity of IPRs and the requirement not to grant licenses to third parties unless the exploitation by at least one of them of the results is provided for and takes place in the internal market). These changes, which make such restrictions severable, are appreciable and appear to better satisfy the proportionality principle.

#### ***Equal access to the results of R&D***

Article 3, paragraph 3, of the draft BER provides that all parties must have “equal access” to the results of the joint R&D for the purposes of further research or exploitation, with the only exception of organizations which are not normally active in the exploitation of results, which may agree to confine their use of results for the purposes of further research. The requirement of “equal access” may be problematic in cases where the parties provide different contributions to the R&D activities and therefore deserve different compensation.

#### ***Specialisation in R&D or exploitation***

In order to benefit from the block exemption, the undertakings must carry out R&D or exploitation of the results jointly. This condition is also satisfied when the work is allocated between the parties by way of specialization in R&D or in exploitation. The draft BER contains new definitions of specialization in R&D and specialization in exploitation which seem to unduly shrink the scope of the block exemption. Indeed, the requirement that each party carries out some of the R&D activities (excluding arrangements whereby one of the parties merely finances or provides IPRs or exploits the results) and the requirement that each party carries out some of the exploitation of the results in the internal market exclude from the benefit of the block exemption agreements involving complementary skills, without any apparent justification in terms of a more effective protection of competition.

### **3. Draft specialization block exemption regulation**

#### ***Notion of potential competitor***

We suggest not to introduce the new definition based on a three years period, for the reasons stated the previous paragraph.

### ***Partial specialization***

The proposal to include in the block exemption those agreements whereby one of the parties only partially ceases production of certain goods or services is reasonable and welcome.

### ***Double market share threshold***

The draft specialization BER introduces a double market share threshold for cases involving intermediate products that the parties captively use as key components for the production of goods or services which they sell downstream on the market. If the market share of the parties on the downstream market exceeds 20%, an agreement is not covered by the block exemption, even if the market share for the intermediate product is below 20%. The Commission justifies this shrinking of the safe harbour with reference to the risk that cooperative agreements result in an anticompetitive foreclosure of competitors in the downstream market (paragraph 153 of the draft Horizontal Guidelines). It would be useful to specify in the Guidelines that for production agreements not covered by the block exemption because at least one of the thresholds is exceeded, there is no presumption of an infringement of article 101. The likelihood of a story of anticompetitive foreclosure must be shown on a case by case basis and must be sustained by adequate evidence.

As for the introduction of the double market share threshold, the draft text can be simplified. Article 3 of the draft BER states that the block exemption applies on condition that the combined market share of the parties does not exceed 20% on any relevant market. The relevant market is defined, in article 1, paragraph 7, in an idiosyncratic way: in this context relevant market means the relevant product and geographic market(s) to which the specialization products belong and, in addition, in case the specialization products are intermediate products used by the parties as key components, the relevant product and geographic market(s) to which the downstream products belong.

It would seem better to avoid introducing a specific definition of the relevant market in this BER, different from the general notion. An easy alternative would be to identify directly in article 3 the markets to which the market share thresholds apply. This can be done by specifying that the exemption provided for in article 2 shall apply on condition that the combined market share of the parties does not exceed 20% in the relevant product and geographic market(s) to which the specialization products belong and, in addition, in case the specialization products are intermediate products used by the parties as key components, in the relevant product and geographic market(s) to which the downstream products belong.

#### **4. Draft Guidelines on horizontal cooperation agreements**

##### ***From the centre of gravity to most upstream indispensable building block***

The new Guidelines relinquish the centre of gravity criterion for the assessment of agreements combining different stages of cooperation. The assessment will consider all concerns pertaining to the different stages of cooperation, starting with the most upstream indispensable building block. As for safe harbours, only those pertaining to the most upstream indispensable building block will apply to the entire cooperation. In principle the new approach seems justifiable, although in some cases its application can be complex.

##### ***Basic principles for the assessment under article 101***

When discussing the nature and content of the agreement, the draft Guidelines identify several ways in which horizontal cooperation agreements may limit competition (including loss of competition between the parties to the agreement, reduction of competitive pressures, increase in the likelihood or in the stability of collusion and foreclosure of competitors). It would be important to state very clearly that, in all these cases, what matters is not the changed relationship between undertakings, but its external impact on the parameters of competition on the market, such as price, output, product quality, product variety or innovation.

In the perspective of self-assessment of cooperative agreements, it might be useful to maintain the indication provided by the 2001 Guidelines on categories of agreements which, because of their very nature, normally do not fall under article 101 (1). Pursuant to paragraph 24 of the 2001 Guidelines, such agreements include cooperation between non competitors, cooperation between competing companies that cannot independently carry out the project or activity covered by the cooperation and cooperation concerning an activity which does not influence the relevant parameters of competition.

##### ***Competitive assessment of information exchange***

The draft Guidelines contain a new section on the competitive assessment of information exchange. Some guidance on this issue had been advocated during the 2008/2009 consultation, also in consideration of the very strict approach to the application of competition rules to exchanges of information taken by some national competition authorities. Therefore, the new section is welcome.

Information exchanges are different from cartels because they can also play a pro-competitive role<sup>6</sup>. Therefore, it does not seem appropriate to convey undertakings the message that normally for information exchange there is a negative presumption of infringement of article 101(1). In our view, since the Guidelines outline the approach that the Commission intends to adopt when applying article 101, a greater effort should be made to point out both the scenarios in which information exchange raises the most significant competitive concerns and those in which an infringement of article 101 is unlikely.

In order to avoid disproportionate chilling effects, the cases in which exchanges of information are considered restrictions of competition by object should be strictly circumscribed to exchanges of individualized data regarding intended future prices or quantities. Given the very serious legal consequences of restrictions by object (including the risk of being fined as cartels), the borders of the restrictions by object category should be clear-cut and not include notions such as “information exchange on current conduct that reveals intentions on future behavior” and “cases where the combination of different types of data enables the direct deduction of intended future prices or quantities”, or “other types of information exchanges (mainly private individualized exchanges between competitors on prices and market shares) whose aim is to restrict competition on the market”<sup>7</sup>.

Like in other jurisdictions, also in the EU the general rule for assessing whether an exchange of information is compatible with competition law should be a restriction-by-effect approach, whereby the exchange of information is considered with reference to its actual or likely impact on the competitive variables on the market.

Using a restriction-by-object approach accompanied by the possibility to justify the agreement under article 101, paragraph 3, is not equivalent: normally, if the exchange of information has no actual or likely anticompetitive impact on the competitive variables, it should be considered compatible with competition law without the need to prove that the indispensability condition (which is rarely met) is satisfied.

The definition of information which is not “genuinely public” (paragraphs 82 and 83) is so broad that it seems to cover in practice any kind of information. It would be inappropriate that the Guidelines discourage any business activity aimed at reducing transaction costs and making information more effectively available to undertakings, since these activities may contribute to a more efficient operation of markets and do not necessarily entail restrictions of competition. Also in this case, a general negative presumption does not seem justified.

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<sup>6</sup> Horizontal Guidelines, paragraph 58.

<sup>7</sup> Draft Horizontal Guidelines, paragraph 68.

The new Horizontal Guidelines do not contain a separate section on environmental agreements anymore. Such agreements will be assessed according to the general criteria indicated in the relevant chapters of the Guidelines (R&D, production, standardization etc.). In principle, we agree with the new approach. However, we respectfully submit that when environmental agreements raise particular issues, the Commission should include in the different sections appropriate guidance for undertakings. The need for specific guidance is particularly clear for information exchanges. In fact, public authorities often require undertakings to exchange or transfer information for reasons relating to the protection of the environment. Sometimes, there is not a clear-cut regulatory obligation covering all aspects: therefore, it cannot be excluded that the exchange of information will be evaluated as an agreement under article 101. For exchanges of information between competitors, however, the draft Guidelines follow a very strict approach in the application of article 101. Since both the protection of the environment and the protection of competition are fundamental objectives of EU law, undertakings should be given very clear guidance on how to behave in order to comply with the indications of public authorities relating to environmental issues without the risk of infringing article 101.

#### ***R&D agreements***

With reference to the risk of anticompetitive foreclosure in R&D agreements (paragraph 121), it is important to ensure full coherence with the approach and safeguards adopted when applying article 102. The Horizontal Guidelines should not suggest that, in the case of agreements, undertakings have a broad duty to deal. Even in the case of dominant companies, a duty to deal only exceptionally arises under article 102.

#### ***Standardisation agreements***

The new expanded section on standardization agreements is welcome and useful.

For the sake of clarity, we suggest to treat standardization agreements and standard terms in separate subsections.

The Commission appropriately proposes a safe harbor under article 101(1) when participation in standard setting, as well as the procedure for adopting the standard in question, is unrestricted and transparent and standardization agreements do not set an obligation to comply with the standard and provide access to the standard on fair, reasonable and non discriminatory (FRAND) terms (paragraph 277). Moreover, the Commission rightly underlines that it is not necessary for a standard-setting agreement to fulfil these conditions to avoid the application of article 101(1). If these conditions are not met, an individual assessment is required to establish whether the agreement falls under article 101(1) and, in the affirmative, whether the conditions of article 101(3) are met (paragraph 276).

Appreciably, the Commission stresses that there should be no bias in favour or against royalty free standards: a different solution would discourage participation of pure innovators in the standard-setting process (paragraph 278).

We respectfully suggest to reconsider the language used in paragraph 284, since it seems to indicate that inclusion in a standard necessarily results in the acquisition of significant market power. There are several different factors which may limit market power, including competing standards and competing products not based on a standardized technology. The Guidelines should clearly indicate that the assessment of whether inclusion in a standard results in a dominant position and, in the affirmative, whether a price conduct can be considered abusive under article 102, should be made on a case by case basis, taking all relevant factors into account.

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