

COMMISSION PUBLIC CONSULTATION HT.1407

Comments by Bird & Bird LLP further to the Commission Review of the current regime for the assessment of horizontal cooperation agreements under EU antitrust rules

1. INTRODUCTION

Bird & Bird LLP (Bird & Bird) welcomes the opportunity to provide comments on the Commission Review of horizontal cooperation agreements under EU antitrust rules.

Bird & Bird's comments will focus mainly on the new sections of Draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union (TFEU) to horizontal cooperation agreements¹ (the **Guidelines**), as well as the main changes to the draft R&D Block Exemption² and the Specialisation Block Exemption³ (the **Block Exemptions**).

2. INFORMATION EXCHANGE

Bird & Bird welcomes the Commission's initiative to provide guidance in a highly complex area in which there is little legal certainty, and which is often a source of concern for clients, in particular following the judgment in *T-Mobile*⁴. Nonetheless, certain additional clarifications would be of great assistance in this area.

2.1 Unilateral "exchange(s)"

The Commission clarifies that, absent an agreement on information exchange, it will have to be assessed on a case-by-case basis whether a concerted practice can be found. By way of example, it questions whether "the regular dissemination of information of a company" is a truly unilateral action which falls outside Article 101 TFEU.⁵ The Commission cites *Cimenteries*⁶ to support the statement that "where only one

¹ SEC(2010) 528/2

² 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.

³ Commission Regulation on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of specialisation agreements.

⁴ Case C-8/08 *T-Mobile Netherlands* [2009] ECR I

⁵ See paragraph 56 of the Guidelines.

⁶ Joined Cases T-25/95 etc *Cimenteries CBR and Others v Commission* [2000] ECR II-491.

undertaking discloses information and (an)other undertaking(s) accept(s) it, there can also be a concerted practice”.⁷

We understand that it will be for the relevant Competition Authority to show that the conditions set out in paragraph 55 of the Guidelines are met (i.e., to prove that such unilateral disclosure falls within the scope of Article 101 TFEU).

However, to the extent possible, it would be useful to clarify what factors (in addition to the existence of unilateral disclosure of information) will typically be taken into account when determining whether a concerted practice exists. In particular, practical examples of what would (or, perhaps more importantly, would not) constitute “acceptance” by other market actors would be valuable in providing guidance and legal certainty to those undertakings that are the recipients of unilateral disclosures of information.

2.2 Market Coverage

The Guidelines state that for an information exchange to be likely to have appreciable restrictive effects, the undertakings involved have to cover “a sufficiently large part of the relevant market”.⁸ It then goes on to state that this cannot be defined in the abstract and will require a fact-specific analysis taking into account the nature of the information exchanged.

In terms of the information exchange itself constituting a restriction by effect, it seems unnecessary to restrict the application of the market share thresholds to those exchanges pursuant to agreements covered by the Guidelines / Block Exemption. It is hard to imagine an effects-based analysis where 30% of the relevant market would not be sufficiently small part such that “competitors that are not participating in the information exchange could constrain any anticompetitive behaviour of the companies involved”, pursuant to the guidance in paragraph 71.⁹ It could therefore be presumed that where an information exchange does not constitute a restriction by object and covers less than 30% of the market, it will not in itself be deemed restrictive of competition. Should the Commission agree, it would be useful for the Guidelines to state this explicitly.

2.3 Current Information

There is some degree of uncertainty created by the Guidelines as regards exchange of current information. This form of exchange is dealt with in Examples 2 and 3 of the Guidelines.

Example 2 states that the exchange of current prices “is not likely to constitute an efficient mechanism for reaching a focal point for coordination”. Example 3 further states that “unless it reveals intentions of future behaviour, this exchange of information does not in principle constitute a restriction of competition by object”. This statement is then qualified by stating that if the aim of the exchange was found to be the restriction of competition, it would normally constitute a restriction by object.

⁷ See footnote 42 of the Guidelines.

⁸ See paragraph 71 of the Guidelines.

⁹ See also paragraph 96 of the Guidelines.

Confusingly, Example 3 goes on to state that in the case of an exchange of current prices “the information exchange would give rise to restrictive effects on competition within the meaning of Article 101(1) because knowing the competitor’s actual current prices would be likely to lead to coordination (i.e., alignment) of companies’ competitive behaviour.” (our emphasis)

It is hard, in the context of a particular example, to understand whether this is conclusion is linked to the specific facts of the example or rather if it is general guidance applicable to the exchange of current price information absent appropriate competitive constraints (present in Example 2).

To provide further clarity, it may be useful to deal with current price information which does not reveal future intentions within the general guidance, as well as within the Examples. Further guidance would also be welcome as regards when, if at all, communication of current prices alone will be deemed to reveal future pricing intentions.¹⁰

3. **R&D AGREEMENTS**

The revised Guidelines and R&D Block Exemption provide useful clarifications and additional guidance in relation to R&D Agreements, and in particular as regards market definitions and the potential restrictive effects of cooperation in R&D.

However, the Guidelines would benefit from further clarifications as regards the new additions to Article 3 of the R&D Block Exemption.

Further, guidance within the Guidelines regarding the potentially restrictive effects of those forms of cooperation specifically excluded from the R&D Block Exemption, as well as with regard to the exploitation of the results of joint R&D generally, would be appreciated.

3.1 **Excluded Forms of Cooperation**

The draft R&D Block Exemption now specifically excludes certain forms of cooperation from the definitions of specialisation in research and development and specialisation in exploitation (at Article 1(12) and Article 1(13)).

We understand that such exclusion from the benefit of the R&D Block Exemption would not necessarily indicate that such agreements are restrictive of competition. Indeed, as regards the exclusion of cooperation limited to funding and exploitation under Article 1(12), paragraph 125 of the Guidelines is indicative of the fact that such forms of “outsourcing” of R&D are unlikely to be restrictive of competition.

As regards Article 1(13), the exclusion of exclusive licensing from the definition of specialisation in exploitation, and in turn from the definition of joint exploitation, logically means this form of cooperation will not benefit from the exemptions built in to Article 5. The reasons for this are understood.

Nonetheless, these specific exclusions from the R&D Block Exemption would suggest that these forms of cooperation cannot automatically be deemed to fall outside Article

¹⁰ See paragraph 68 of the Guidelines.

101 TFEU. It would thus be helpful to indicate, perhaps within the Guidelines, how the Commission would assess the excluded forms of cooperation.

3.2 **Equal Access**

3.2.1 **Equal Access for the purpose of further exploitation**

Article 3(3) of the R&D Block Exemption now reads “the research and development agreement must stipulate that all the parties must have equal access to the results of the joint research and development for the purposes of further research and exploitation”. (our emphasis)

The confusion arises regarding the use of the word “equal access” when referring to further exploitation. The contributions made by both parties to a research project may be far from equal. In such a case, equal access may not be justified, and distinctions will be made as to the terms on which each party may exploit the results.

Clearly, Article 5 gives scope for the parties to allocate territories or customers exclusively by way of specialisation in exploitation, without such specialisation having to be “equal”. However, depending on the interpretation of the term “equal access”, these Articles could appear contradictory.

Additional guidance in this regard would be welcomed by industry.

3.2.2 **Exception to Equal Access**

The exception incorporated within Article 3(3) seems to be a source of further confusion as regards the meaning of “without normally being active in the exploitation of results”. We understand that many research institutes and academic bodies now have a licensing arm / entity active in the licensing of IP / know-how. The exact application of the words “normally” and “active in the exploitation” in such circumstances is unclear.

Further guidance as to the impact of this addition to the R&D Block Exemption would be appreciated.

3.3 **Disclosure of Intellectual Property**

3.3.1 **Article 3(2)**

Article 3(2) now provides that parties must agree to disclose all existing and pending intellectual property rights prior to starting the R&D, as far as they are relevant to the exploitation of the results by the parties.

Feedback from industry is that it can be very difficult to determine, prior to the start of the R&D cooperation, which IPRs will be relevant to exploitation of the results. As such, it is possible that parties will in good faith omit to disclose certain IPRs relevant to exploitation.

The R&D Block Exemption and the Guidelines are silent as to the impact of any such omission. On a literal reading, the Block Exemption would immediately and

permanently cease to be applicable to the agreement. It is further unclear whether this will entail subsequent disclosure and / or licensing obligations.

It may be beneficial for the Commission to amend the obligation under Article 3(2) to provide that parties agree to disclose relevant IPRs as soon as their relevance to the exploitation of the results is known. In any event, inclusion of guidance in the Guidelines as to how such an omission can be rectified in order to retain the benefit of the R&D Block Exemption and / or to avoid falling foul of competition law would be welcome.

3.3.2 Article 3(4)

We note that, whilst under Article 3(2) IPRs must be disclosed prior to starting the R&D “as far as they are relevant to the exploitation of the results by the parties”, Article 3(4) states that access to know-how need only be granted “where the research and development agreement provides only for joint research and development”.

As such, the first obligation would apply to all R&D agreements, the second only where the agreement does not provide for joint exploitation. The logic behind this distinction is unclear, and we query whether such clear differentiation is intentional. If it is, greater clarity in this regard would be welcome, as well as an explanation as to reasons for this (perhaps in the preamble to the R&D Block Exemption).

3.4 Existing Agreements

We understand that many of the changes to the R&D Block Exemption are intended to clarify the scope of the previous Block Exemption, rather than limiting its application.

The more significant changes which could require amendments to existing agreements falling within the current R&D Block Exemption are introduced in Article 3. The need for parties to amend existing R&D Agreements to take account of these changes makes it all the more important to clarify the exact implications of these changes for existing agreements.

In particular, as requested under point 3.2 above, the logic and impact of the term “equal access” at Article 3(3) should be clarified in the Guidelines in order to avoid undue pressure to renegotiate commercial terms. Further, failure to disclose pre-existing or pending IPRs prior to the R&D will presumably need to be rectified *a posteriori* in order to benefit from the R&D Block Exemption following the transitional period. As under point 3.3 above, guidance should be given as to how this can be achieved.

4. SPECIALISATION AGREEMENTS

The revised Specialisation Block Exemption contains valuable clarifications, but also a notable absence of definitions for certain key terms.

The Specialisation Block Exemption provides a definition of what will be considered to be “specialisation agreements” at Article 2(1). Joint production is included, defined as those agreements by virtue of which two or more parties agree to produce certain products “jointly”. Whilst “jointly” is specifically defined for distribution purposes, as regards production this is not defined further.

Equally, the definition of reciprocal specialisation agreements includes agreements between two or more parties active on the same product market(s) by virtue of which two or more parties on a reciprocal basis agree to fully or partly cease or refrain from producing certain but different products [...]” (our emphasis). There is no clarification as to whether this requires that the reciprocal specialisation concern two entirely distinct product markets and, if not, what constitutes “different products”.

Whilst the absence of definition could be interpreted as granting the parties to the agreement greater freedom when structuring agreements, it also creates unnecessary legal uncertainty.

Should it be the wish of the Commission to leave these terms undefined in order to avoid being overly prescriptive, a statement in this regard in the Guidelines, and use of illustrative examples, would go a long way to reassuring parties that the terms should not be read restrictively.

5. PURCHASE AGREEMENTS

The clarifications provided to these sections are welcome. We note however that the Commission does not take the opportunity to modify the market share thresholds in order to give greater legal certainty to purchasing agreements between companies without market power whose impact is beneficial to competition, and can lead to lower prices for consumers.

5.1 Purchaser Market Share

Relative to market share thresholds present in the De Minimis Notice which states that save for hardcore restrictions, agreements between competitors with 10% share will have no appreciable effect on competition, and other Block Exemption Regulations which allow for market shares up to 30%, the 15% combined market share threshold for purchasing agreements, applicable to both the purchasing and selling markets,¹¹ appears unnecessarily low.

It is understood that a market share above one or both of these thresholds does not automatically indicate that the purchasing agreement is likely to give rise to restrictive effects on competition.¹² Nonetheless, the fact that the level is significantly lower than those set out for other agreements gives the impression that purchasing agreements have a particularly restrictive effect already between 15-30% market share which other agreements do not.

Furthermore, it seems unnecessary to apply the same share on both the upstream purchasing market and the downstream selling market, as it is the share on the downstream market which is most important when assessing whether the benefits achieved via joint purchasing will be passed on to customers.¹³

We query whether the threshold might not be increased, in particular for the upstream purchasing market. Should the Commission feel strongly that above 15% excessive pressure could be placed on suppliers of the parties, perhaps an increase in the

¹¹ See paragraph 203 of the Guidelines.

¹² See paragraph 204 of the Guidelines.

¹³ See paragraph 214 of the Guidelines.

threshold could be linked to the market structure and in particular the concentration levels on the supplier's market, or of those sellers present on the relevant market (e.g., 25% share threshold where the supplier's market is highly concentrated, e.g., 3 players or less).

6. **PASS-ON TO CONSUMERS**

We note the Commission has given additional prominence within these Guidelines to the requirement that efficiencies are passed on to consumers. This emphasis and additional guidance is welcome.

However, we note that as regards production and R&D agreements, much of the focus of the explanations as regards the effect of market conditions is on pass-on of cost savings. Whilst these are of course important, it may be worth expanding on how the Commission views pass-on of innovations or product enhancements (better quality or variety) may be affected by market conditions. In particular it would be useful to know if the Commission considers that this form of efficiencies are more likely to be passed on to consumers than savings to fixed costs, or even variable costs.

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