

## Position paper



# European Commission consultation on the revision of block exemption regulations and guidelines for horizontal cooperation agreements

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**Competition,  
Public Procurement  
and Consumers**

On 4 May 2010 the European Commission published drafts of two revised regulations and the associated guidelines for assessment of horizontal cooperation agreements between competitors. The new texts are a draft regulation on the application of article 101(3) TFEU to categories of specialisation agreements (“specialisation regulation”), a draft regulation on the application of article 101(3) TFEU to categories of research and development agreements (“R&D regulation”) and a new version of the guidelines on horizontal cooperation agreements (“horizontal guidelines”). The provisions currently in force expire on 31 December 2010.

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The Federation of German Industries (*Bundesverband der Deutschen Industrie e.V.* – BDI) thanks the European Commission for the opportunity to comment on the draft new rules for horizontal cooperation agreements.

As BDI made clear in its 10 February 2009 position on experience with the current rules German industry is in favour of rules on horizontal cooperation agreements which offer companies valuable practical guidance on how to assess their joint projects in the light of European competition law. Co-operative agreements are of growing importance for companies. In the wake of globalisation, rapid technological change and increasingly dynamic markets, companies are turning more and more to horizontal cooperation in their efforts to remain at the forefront of competition. In this respect, cooperation agreements can generate an economic benefit and safeguard effective competition.

For that reason, BDI welcomes the fact that the European Commission wants to introduce new block exemption regulations and guidelines for this important area after the current rules on horizontal cooperation agreements expire at the end of 2010. By and large, the new arrangements set out in the drafts, in particular in the horizontal guidelines, are appreciated. The Commission has incorporated several suggestions from BDI’s 10 February 2009 position.

However, BDI believes that the Commission could provide further clarifications in some areas in order to avoid legal uncertainties for companies. German business would also welcome a more positive stance by the European Commission on cases of information exchange between companies, and on standard-setting agreements. Lastly, BDI would like to reiterate its

**Bundesverband der  
Deutschen Industrie e.V.**  
Mitgliedsverband  
BUSINESSEUROPE

*Telekontakte*  
T: 0032 2 792 1005  
F: 0032 2 792 1010

*Internet*  
[www.bdi.eu](http://www.bdi.eu)

*E-Mail*  
[n.rossmann@bdi.eu](mailto:n.rossmann@bdi.eu)

criticism of the concept of market share thresholds in the provisions on horizontal cooperation agreements.

In the commentary below, we look individually at these and a few other points where we see room for improvement. We concentrate in particular on changes to the horizontal guidelines and remarks on the draft R&D regulation.

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## **A. Comments on the concept of market share thresholds**

BDI has in the past repeatedly spoken out against the concept of market share thresholds. The difficulty of calculating incontestable market shares is inconsistent with the European Commission's goal of providing adequate legal certainty for companies. Above all, the total market volume is often unavailable from reliable data sources. Estimates of market shares are possible, but this shifts uncertainty about the application of a block exemption regulation on to companies.

Small and medium-sized enterprises in particular stand to benefit from the synergy effects of cooperation agreements. They have to survive in fierce competition on global markets. But small and medium-sized enterprises are often ineligible to take advantage of the block exemption regulations because their market share lies above the market share thresholds, despite their modest size, if they are active in niche markets. Yet cooperation possibilities should be extended to include precisely such businesses.

A complicating factor is that the various thresholds in the rules on horizontal cooperation agreements vary considerably. For instance, a 15% market share threshold continues to apply also in the draft new horizontal guidelines for purchasing and commercialisation agreements. The specialisation regulation seeks to exempt companies with market shares of up to 20%. The new version even proposes the introduction of a second market share threshold for specialisation agreements on the manufacture of intermediary products which one or more of the parties use in full or in part for the production of downstream products. Companies with a market share of up to 25% can still benefit under the R&D regulation for research and development agreements.

If the Commission wishes to maintain market share thresholds despite these fundamental objections, it should harmonise and increase the thresholds for horizontal cooperation agreements. In this way, imponderables in determination of the relevant market shares could at least be reduced somewhat. A single market share threshold of 25% would be manageable in practical terms and proportionate in terms of competition policy. In addition, it would be helpful if the Commission were to give companies more specific guidance for determination of the relevant market. In our view, the Commission's 1997 communication on definition of the relevant market is too abstract and hardly helps companies in practice.

### **I. General comments**

BDI is pleased that the Commission provides benchmarks for the assessment of various forms of horizontal cooperation agreement against competition law in the guidelines. The current guidelines dating from 2001 still relate to a period when legal certainty about the compatibility of specific agreements with what is now article 101 TFEU could be ascertained in companies on the basis of individual exemptions and “negative certifications”. This possibility has ceased to exist since introduction of the principle of self-assessment in the framework of regulation 1/2003. It is therefore consistent that the Commission provides additional parameters for assessment of various forms of horizontal cooperation in the guidelines. In particular, it is helpful that the Commission uses case studies to identify relevant groups of cases and gives indicators for their assessment.

BDI also welcomes the Commission’s “more economic approach” for assessment of competition issues. Only behaviours which can be objectively proved to restrict competition should be banned under antitrust law. However, the objective proof of competition restriction can only be adduced through economic assessments and analyses, backed up by calculations where appropriate. At the same time, the more economic approach throws up considerable problems in practice with respect to the competition self-assessment required by regulation 1/2003, especially in the case of “normal” competition cases. It is often difficult to quantify and evaluate the competition drawbacks and efficiencies of a specific cooperation agreement if the data needed for a comprehensive economic analysis are not available or can only be obtained at considerable expense measured in time or money – in particular with regard to the practical need for a sufficient degree of legal certainty. To this can be added the fact that the guidelines link the applicability of article 101 TFEU to market share thresholds – for instance in the case of purchasing and commercialisation cooperation agreements. In practice, the data necessary for an economic analysis can typically only be comprehensively collected and professionally evaluated (e.g. in an econometric analysis) in prominent individual cases which may possibly be the subject of an administrative or judicial procedure.

In the day-to-day running of a business, this option is not usually available. Accordingly, for the many such cases – whose aggregate significance is enormous – it is essential to identify relatively straightforward and workable ground rules which lead to robust results and hence to legal certainty. Hitherto, those who must apply the law have only been given indications of what is legally acceptable. BDI would therefore like the Commission to provide more concrete benchmarks and to extend the catalogue of case stud-

ies for permissible and proscribed forms of cooperation, in particular also on the issue of what behaviours are generally unobjectionable under competition law (“*safe harbours*”). The horizontal guidelines describe cases which are often relatively obvious examples of what is and what is not allowed (e.g. points 216 and 217 on purchasing cooperation agreements). Instead of giving an illustration of extremes of banned and acceptable forms of horizontal cooperation where virtually no doubt exists, it would be desirable for the horizontal guidelines to give further concrete pointers for the entire spectrum of possible cooperation arrangements where a simple “black or white” assessment is not possible. Companies can only assess such grey areas with some degree of confidence if they know and understand the criteria regularly applied by the Commission.

## **II. Individual comments:**

### ***1. Agreements between parent companies and (joint) subsidiaries (point 11 horizontal guidelines)***

The horizontal guidelines make it clear that article 101 TFEU is not applicable in the relationship between parent companies and their (joint) subsidiaries. We welcome this clarification in principle. It has considerable practical importance, in particular for agreements between joint ventures (JV) and their (joint) parents. Such agreements are rightly exempt from investigation in accordance with article 101 TFEU thanks to the clear statement now incorporated in point 11 of the horizontal guidelines.

But BDI would like to see even clearer statements on the non-applicability of article 101 TFEU in the constellations described:

- a)** The Commission should clearly specify the concrete objective criteria for exclusion from article 101 TFEU. The horizontal guidelines set out two (or possibly three) criteria for determination of a close relationship between parent and subsidiary leading to an exemption from article 101 TFEU. The coverage of these criteria seems uneven and the interaction between them is unclear:

Taking its cue from the terminology used in ECJ jurisprudence, the Commission currently refers to the aspect of “*decisive influence*” on the subsidiary (or JV). Agreements between a parent company and its subsidiary would not be subject to investigation in accordance with article 101 if the subsidiary is subject to decisive influence of a parent company because the two would then form a single economic entity and are hence part of the same undertaking. In such cases, an agreement between independent undertakings – a requirement for application of article 101 TFEU – is absent.

However, the horizontal guidelines simultaneously identify the criterion of “*effective control*” pertinent for merger control as a relevant benchmark. Furthermore, the Commission explains (in footnote 6 to point 11 horizontal guidelines) that “*joint management power*” between parent companies should be taken as meaning that they have “*decisive influence*” over the JV.

The Commission does not explain whether these criteria are merely different formulations of the same substantive concept or whether there are in fact two (or three) different benchmarks. If the latter interpretation is correct, the Commission fails to take a stance on what the difference is supposed to be between “*(joint) decisive influence*” (or “*joint management power*”) and the cumulatively used concept of control.

BDI believes that there should be a single criterion for the application of article 101 TFEU to agreements between parent companies and subsidiaries. It is not clear how “*(joint) decisive influence*” or “*joint management power*” relates to the concept of (joint) control. Neither is it immediately obvious what real benefit would arise from having more than one criterion, or which criterion would prevail in cases of conflict.

For reasons of legal certainty, it would be preferable to use a uniform criterion that is workable in practice. If this is not the case, parents of a jointly controlled JV will regularly find it impossible to reach a dependable assessment of whether a particular cooperation agreement (e.g. an R&D agreement with the JV) is exempt from application of article 101 TFEU, or whether instead the provisions of the R&D regulation or of article 101(3) TFEU must be taken into consideration. Only with an unambiguous criterion can companies be granted self-assessment under competition law (*ultra posse nemo obligatur*), in accordance with regulation 1/2003. A dependable self-assessment is of considerable practical importance for companies, not least due to the risk of a fine if article 101 TFEU proves to be applicable.

In BDI’s opinion, only the concept of concentration relevant for merger control should be decisive. This has been applied to a wide spectrum of different cases, particularly in a multitude of merger decisions and in the Commission’s Consolidated Jurisdictional Notice on the control of concentrations between undertakings (point 11 et seq.), which has led to considerable differentiation. Experience to date with merger control shows that the criterion is very workable in practice. It would therefore be welcome if this criterion already familiar in antitrust practice would also be (solely) determinant for the issues dealt with in point 11 of the horizontal guidelines. Conversely, the references contained in the horizontal guidelines to other benchmarks should be deleted – not least because they do not promise any additional knowledge in this context and inasmuch only cause

confusion. This would significantly increase the transparency and practical workability of the approach formulated by the Commission in point 11.

- b) BDI would also find it beneficial if the Commission were to include a few concrete examples for non-application of article 101 TFEU to agreements between parent companies and their (jointly) controlled subsidiaries. In particular, the horizontal guidelines should clarify that the explanations in question apply not only for relevant horizontal cooperation agreements but also for forms of vertical cooperation (e.g. distribution agreements between a parent company and a (jointly) controlled subsidiary). This would simultaneously increase legal certainty.
- c) BDI points out that the explanations in point 11 horizontal guidelines should not be misunderstood as meaning that a parent company is automatically liable for antitrust infringements by a subsidiary or JV in the case of jointly control. Whether and under what circumstances a parent company can be considered liable for antitrust infringements of a JV is currently being decided by the Court of Justice of the European Union (cf. case T-76/08 – Du Pont de Nemours/Commission; case T-77/08 – Dow Chemical/Commission; case T-541/08 – Sasol et al./Commission). In BDI's view, a parent company cannot be considered liable unless and until it is proved to be actively involved in the antitrust behaviour of its subsidiary or JV via its control rights.
- d) BDI also encourages the Commission to incorporate more details on exchange of information in the framework of joint ventures in the relevant paragraphs (point 54 et seq.) (see also section B II 3).

## **2. Concept of “most upstream indispensable building block” (point 13 et seq. horizontal guidelines)**

Points 13 et seq. contain a new concept for determination of the section of the horizontal guidelines that seeks to identify the starting point for evaluation of agreements relating to “mixed” forms of cooperation. Whereas hitherto a “*centre of gravity*” test has been applied to ascertain which parts of the horizontal guidelines apply to mixed agreements, the “most upstream indispensable building block” of an integrated cooperation agreement would now determine the applicable section of the horizontal guidelines for the competition test. However, the competition concerns and corresponding explanations set out in the chapters pertaining to the downstream activities of the integrated cooperation agreement would “generally” also guide the assessment of these activities.

BDI welcomes the Commission's objective of providing companies with more legal certainty via a new test. However, in our view it is questionable

whether and to what extent the new criterion of “most upstream indispensable building block” helps in this respect. In any event, the explanations in the horizontal guidelines are open to misunderstandings and therefore at least require clarification.

This applies in particular with respect to the relevance of applicable exemptions (“*safe harbours*”) in various chapters of the horizontal guidelines. According to point 13, safe harbours should apply exclusively for all integrated cooperation agreements as set out in the chapter on the “most upstream indispensable building block”. However, at the same time, the assessment “would change” (point 14) if the parties would have engaged in a building block “in any event” irrespective of the other building blocks. In such cases, the (apparently joint) agreement would be examined in line with the principles set out in the chapter that deals with the building block agreed “in any event”.

Insofar as not explained in closer detail, this approach creates application problems for a range of “combined” agreements that can be envisaged. This is the case in particular if there are no doubts about whether and to what extent the various elements of the contract are built on each other, or are economically interdependent.

*Example:* two competitors agree on a “combined” purchasing and R&D agreement. The market shares of the cooperation partners are around 40% for the R&D component. However, for the joint purchasing of homogeneous bulk goods – e.g. copper wire – used for the R&D (but not for subsequent production of the research results), the joint market share is well below 15%.

- Insofar as the R&D component is regarded as the “most upstream indispensable building block”, the whole of the agreement could lose the justification for exemption because the 25% ceiling for an R&D safe harbour has been exceeded, in application of point 13. The principle set out in point 13 should apparently apply independent of the agreement’s concrete market effects and independent of the fact that the 15% ceiling valid for purchasing agreements (point 203 horizontal guidelines) is not exceeded. Such a “mechanical” result is surprising. Furthermore, this example also shows that the “most upstream indispensable building block” test needs to be elaborated. After all, in this case, the purchasing component could also be regarded as the “most upstream indispensable building block”, if the development cooperation would make no sense without joint purchasing, and that it is therefore the basis of the cooperation. This would depend largely on the circumstances in the individual case and ultimately – probably to a greater or lesser extent – on the focus of the agreement. But then, the distinction between the new criterion

and the existing centre of gravity test is not clear. If the latter approach is followed, the upstream R&D would apparently be justified alongside the purchasing agreement, because the 15% threshold for the latter is not exceeded. In other words, the results are contradictory. In this regard, the horizontal guidelines need to be corrected or at least clarified with concrete examples.

- By contrast, if the parties would buy copper wire “in any event” irrespective of the joint R&D, the situation could apparently change as specified in point 14, so that the safe harbours would apply for purchasing cooperation agreements. The purchasing cooperation agreement would then be justified in any event. It is not clear from the Commission’s draft what would apply for the rest of the agreement. It emerges from point 14 only that “the agreement” has to be assessed in line with the principles applicable for purchasing cooperation agreements but not whether these benchmarks (and in particular the relevant safe harbours) are also determinant for the joint R&D.

The application problems highlighted cannot be solved satisfactorily and with the predictability that companies need without a clear understanding of the intention underlying the new test. Since the purpose of the new criterion is not immediately obvious, an explanation of the reasons and direction of travel that motivated the Commission for the choice and structure of the criterion would be desirable as a guide for application of the horizontal guidelines to “combined” agreements.

Insofar as the Commission intends to retain the new concept, BDI also calls for several additional application examples to be included for tangible clarification. In particular, these examples should set out more clearly the conditions under which a contractual building block is regarded as “indispensable” and “upstream”. In particular, it should be made clear whether the “upstream building block” criterion also applies for purchasing cooperation agreements (combined with other building blocks), or whether the test is applicable only to combinations of activities geared to product sales (for instance combination of R&D, downstream joint production and downstream joint distribution). A clarification would also be desirable for the individual conditions under which an “integrated” cooperation can be assumed (i.e. assessment on the basis of the “most upstream indispensable building block”), and whether only the safe harbours of this building block are then always and without exception determinant. Furthermore, it is important to clarify what requirements must be met to provide the proof needed for point 14 that a component would be agreed “in any event” irrespective of the other building blocks. This is of central practical importance. The Commission’s new concept apparently draws considerable distinctions between “simple” combinations of different agreement components which are only marginally in-

terconnected or totally unconnected and which could equally well be contained in separate agreements, and integrated agreements whose various building blocks are intended to stand or fall together. Lastly, there should be a clarification for “simple” combined agreements as to whether the safe harbours of building blocks agreed “in any event” can also justify the other elements of the agreement. This question is not answered unambiguously in point 14 as currently worded.

### **3. *Competitive assessment of information exchange, points 54 et seq., horizontal guidelines***

BDI welcomes the fact that the Commission wants to include pointers for competitive assessment of information exchange in the horizontal guidelines. In particular, it is helpful that the Commission has summarised its practice to date based on many individual cases in a single document. This will make it easier for companies and their lawyers to have a rapid overview.

All in all, the Commission seems to regard exchange of information between companies with great scepticism – despite the essentially positive statement in point 58 which states that an exchange of information is very often pro-competitive. This is regrettable, especially since Commission practice on horizontal cooperation agreements in many cases calls for exchange of information between companies, for instance for calculation of market shares or disclosure of intellectual property rights. Hence, a more positive stance on exchange of information on the part of the Commission would be helpful.

BDI is disappointed that the section of the horizontal guidelines on assessment of information exchange does not give concrete proposals for the conditions that would usually not be regarded as restricting competition. Without such safe harbours, many companies and federations will find it difficult to align their practice on the horizontal guidelines with the necessary legal certainty. In this connection, it would be helpful if the safe harbours were formulated in such a way that small and medium-sized enterprises can implement the horizontal guidelines easily and without the need to call in specialised competition lawyers.

In addition, BDI calls for further examples in point 98 et seq. In our view, the examples given unfortunately do not sufficiently explore practical needs, since admissibility or its absence is seldom as clear in operational cases as it is in the examples chosen by the Commission.

In detail:

*Point 68, horizontal guidelines*

BDI doubts that cases where linking different types of data allows conclusions about planned future prices and volumes regularly constitute a restriction of competition by object. Rather, the circumstances of the individual case should be determinant for the assessment. It is easy to envisage constellations in which such linkage was not obvious and did not unequivocally reflect the intention of the companies involved. In our view, identification of a restriction of competition by object should be conditional on the fact that it must have been obvious from the circumstances of the individual case that the information exchanged – when linked – allows direct conclusions for planned future prices or volumes and could hence be used for anti-competitive behaviour. If this is not the case, there is no restriction of competition by object. According to the concrete market effects in the individual case, one can at the most examine a restriction by effect. Classification of an exchange of information as a “hardcore” infringement should be limited to the cases set out in point 67.

*Point 73 et seq., horizontal guidelines*

BDI would like to see more concrete pointers and definitions in the paragraphs on market characteristics and their assessment for exchange of information. For instance, it is not clear at first glance what the Commission means by “tight oligopolies” (point 75).

*Point 81, horizontal guidelines*

It is broadly positive that the Commission breaks down information into sensitive and non-sensitive data. However, BDI would like to see a greater differentiation between individual data. Even if the Commission indicates which information it believes to be most strategically useful, this still leaves companies facing great uncertainty. For instance, the “turnover” criterion should distinguish whether this turnover relates to an individual product or to the product range. This could have different implications for strategic usefulness. In general, a competition-restrictive effect should only be feared when several sets of strategically useful data are put together.

*Point 82, horizontal guidelines*

The Commission seems to base its evaluation of whether information is public or non-public in the first instance on whether access to the information is “costless”. In our view, however, it is more a matter of whether transparent and discrimination-free access is possible.

Regarding the explanations on “genuinely aggregated” data and “historic” data in points 85 and 86, BDI calls for further clarifications. For example, in point 85 the Commission could specify a certain minimum number of participants in an aggregate in order to draw a line between individual and aggregated data. According to point 86, the question of whether data can be classified as historic depends on the specific characteristics of the relevant market. In this regard, data “can” be considered to be historic if they are “several times older than the average length of contracts in the industry”. This does not offer companies sufficient legal certainty. It also remains unclear whether – and, if so, why – the Commission has moved away from the practice it describes in footnote 57 whereby data that are older than one year can already be considered historic.

*Exchange of information and work in associations*

In point 59 of the guidelines for competition assessment of maritime transport services dated 1 July 2008 (Official Journal C 245/2), the Commission expressly recognises the importance of associations as a means for legitimate exchange of information. BDI would welcome it if the Commission could also include a similar paragraph in the horizontal guidelines. In many business sectors, it is usual – and unobjectionable from the angle of competition law – to collect, exchange and publish statistical aggregates and general market information via sectoral associations. This published market information is a good means for improving market transparency and information for customers, hence enabling efficiency gains. However, companies and associations still experience great legal uncertainty due to a lack of clarity about the legal requirements.

In BDI’s view, it would therefore be beneficial if the Commission were to create a safe harbour for those cases in which there is an exchange of information between an appropriate number of companies via an institution, such as an association, which is not itself active on the relevant market and which collects information from the companies and aggregates it in such a way that it can no longer be traced back to the individual companies.

*Exchange of information and joint ventures*

BDI would like the explanations and examples to be supplemented to include exchange of information with regard to joint ventures. For practical implementation of the law, it would be particularly helpful to have an explanation as to the extent that article 101 TFEU is applicable to information flows

- within the JV (e.g. exchange of information between JV employees delegated by their respective parent companies),
- between the JV and the parent companies (e.g. information needed to steer the JV or use of knowledge generated in the JV within the respective parent companies for different projects), and
- between the parent companies, insofar as this relates to the JV.

#### **4. *Agreements on joint production, points 144 et seq., horizontal guidelines***

BDI welcomes the fact that the Commission devotes more space to subcontracting agreements between competitors in points 145 et seq. horizontal guidelines. In the rules that currently apply, there is a deficiency of more specific benchmarks for the admissibility of such agreements, which are very important for many companies. The mention at the start of the section on agreements on joint production makes it clear that the entire section applies to subcontracting agreements.

#### **5. *Purchasing agreements, points 189 et seq., horizontal guidelines***

The revision of the guidelines with regard to purchasing agreements is broadly welcome. As we understand it, the revision does not make any fundamental changes but confirms the core explanations in the existing horizontal guidelines and substantiates them further.

Nevertheless, the Commission continues to assume that purchasing agreements between competitors are not covered by article 101(1) TFEU if the parties to the agreement together account for a market share of less than 15% not only on the relevant purchasing markets but also on the selling markets (point 203). However, only purchasing markets should be taken into account for determination of market shares. Inclusion of selling markets for calculation of market share leads to purchasing cooperation agreements of large companies regularly falling within the scope of article 101(1) TFEU. To this is added the fact that market shares on selling markets are almost impossible to ascertain with legal certainty – especially in the case of large purchasing cooperation agreements.

In BDI's view, it would be desirable for the new horizontal guidelines to clarify the conditions under which application of article 101(1) to purchasing agreements is improbable if the parties are not active on the same relevant downstream markets (i.e. they are not competitors on selling markets). In this respect, point 197 poses the general condition of a "*significant degree of purchasing power*" (which must not extend to market dominance). For users, there is still a great deal of uncertainty regarding cases where

joint purchasing power lies between 15% and market dominance. For reasons of legal certainty, it would be extremely helpful if the non-specific legal concept of a “*significant degree of purchasing power*” were to be expressed in more concrete terms for the case of competition solely on purchasing markets.

BDI welcomes the fact that indications on exchange of information have also been included in the section on purchasing agreements (points 210 et seq.). Nevertheless, the indications for the existence of a joint purchasing organisation should be made more concrete. In particular, we would be interested to know whether a joint purchasing organisation necessarily presupposes a stand-alone corporate unit. Small and medium-sized enterprises in particular will in general not be able to set up such separate purchasing organisations. It would also be helpful to have more detailed indications on implementation of purchasing cooperation agreements without a separate purchasing organisation.

It is positive that the Commission has deleted from point 215 the restriction contained in point 134 of the existing guidelines whereby a dominant market position either on the purchasing market or on the selling market rules out an exemption.

#### **6. *Commercialisation agreements, points 220 et seq., horizontal guidelines***

BDI calls for a further clarification also in the section on commercialisation agreements. For instance, it is not clear what the Commission understands by “agreements between competitors exceeding a certain size” in point 222. The same applies for the treatment of non-reciprocal distribution agreements for which the Commission merely states that the risk of market partitioning or restriction of competition is less pronounced than in the case of reciprocal agreements (points 231 and 233). This does not produce clear consequences for companies. The introduction of additional safe harbours would be desirable here, for instance specifying that non-reciprocal distribution agreements which do not contain any price agreements or customer/territorial allocations below a certain joint market share are exempted in any event. According to point 235 it is only “likely” that the parties are exempted, if their combined market share does not exceed 15 %.

#### **7. *Standardisation agreements, points 252 et seq., horizontal guidelines***

BDI welcomes the fact that the Commission has included pointers for assessment of various competition questions linked to licensing in the horizontal guidelines. In particular, it is helpful that the Commission emphasises the generally positive effects of standardisation agreements in point 258 of the horizontal guidelines and includes a safe harbour for standardisa-

tion agreements and standard terms in points 276 et seq. of the horizontal guidelines. German business campaigns for efficient, transparent and discrimination-free standard-setting. In this respect, it supports the Commission's efforts to achieve a clear and balanced policy for protection of intellectual property rights which simultaneously avoids abuse of the standard-setting process.

Nevertheless, BDI fears that the current draft would lead to over-regulation of standardisation agreements which goes beyond the needs of competition law. Despite the generally positive effects of standard-setting agreements, it seems at various places in the guidelines that a general suspicion against the admissibility of standardisation agreements driven by antitrust concerns determines the basic line taken in the draft. In our view, this is not justified. In the overwhelming majority of cases, the tension between the different interests of the parties described by the Commission will produce a balance and prevent individual companies from asserting their interests one-sidedly to the detriment of competitors and/or customers. By contrast with the Commission's finding, it is not only the interests of competitors for the relevant technologies that are represented in standard-setting discussions, but often also the interests of end customers, intermediate customers / system integrators, suppliers, manufacturers, vertically integrated technology owners and product manufacturers, knowledge / research institutes, etc. BDI calls for this broad interest representation to be enshrined as a best practice recommendation for the standard-setting process in the horizontal guidelines.

Individual comments:

*Point 259, horizontal guidelines*

Given the generally heterogeneous composition of companies involved in a standard-setting process, we see no particular reason why discussions on standardisation could lead "like all meetings between competitors" to a reduction or even elimination of price competition.

*Point 260, horizontal guidelines*

This point seems easy to misunderstand. It should be made clear that the risk of competing technologies being excluded exists only if the standard – *de jure* or *de facto* – stipulates a certain technology for an entire product type on a binding basis and competing standards for interchangeable products are inconceivable or inadmissible. Otherwise, the competition between different standards would prevent the stipulation of a certain technology in a standard acting as a market constraint for competing technologies.

BDI would like to see a more concrete formulation of the conditions under which a company can benefit from the safe harbour in points 276 et seq. Thus, while it is welcome that the Commission tries to take account of both the interests of owners of property rights in a measured assessment of their rights and the interests of users of industrial standards in open access to the relevant markets, there are still many open questions. For instance, regarding the obligation for disclosure of the requisite intellectual property rights in point 281, it is not clear how the Commission wants to ascertain that an IPR holder has made “reasonable efforts” to establish itself as the owner of potentially necessary property rights for the standard in question. Also unclear is what is understood by “essential IPR” in the framework of the obligation to submit a FRAND commitment in point 282. It would also be helpful to have more detailed indications on the question of when the Commission believes that a licence has been awarded under “reasonable” conditions – for instance, what criteria the Commission applies for assessment of the level of licence fees (point 283). The indications in points 284 et seq. do not help in this respect (see below).

*Point 284 et seq., horizontal guidelines*

Although the Commission’s explanations in points 284 and 285 relate to article 102 TFEU and therefore have no immediate relevance for a competition assessment of standard-setting agreements in accordance with article 101, BDI welcomes the objective of giving companies benchmarks for the determination of fair and reasonable licence fees. The Commission’s proposal that the licence fees that a company charges for a patent should be compared before and after standard-setting should however be revisited to examine its workability – this method is likely to lead to uncertain results in particular in cases involving complex and dynamic development processes.

BDI agrees with the Commission regarding the assessment of cost-based methods. These are not suitable for determining the economic value of patents. In the first place, as the Commission rightly points out, there are major practical difficulties for estimating costs. In the second place, cost-based methods are also essentially not suited for determining the true economic value of patents. Among other things, an entirely cost-based assessment says nothing about an appropriate margin. In addition, a purely cost-based value assessment of patents would structurally jeopardise or even impede the intended reward and incentive function of the patent system. The purpose of safeguarding patent rights is to reward the owner for his work, and to encourage him and others to develop and explore new technologies.

We are also sceptical about the commissioning and use of independent expert assessments. The task of the Commission should be to develop guidelines which experts can use to reach their assessments. In addition, BDI has doubts about whether it is possible to determine different economic values for essential patents under the same standard. All essential patents under a standard will regularly have the same economic value, since a functional product on the basis of this standard cannot be produced and used without a licence for these patents.

*Point 287, horizontal guidelines*

BDI has doubts about the practical relevance of a unilateral prior disclosure of the most restrictive licensing terms. In many cases, any transparency gained in this way would not help to prevent anti-competitive licensing terms after standard-setting. First, there will be no comparability in the majority of cases. Licence fees can encompass one-off payments, on-going fees, fixed amounts, percentage amounts of product sales price, minimum fees, prepayments, volume rebates and other forms of compensation as well as combinations of the above. Second, many years usually pass between the first draft of a standard and mass sale of the relevant products, which could raise questions about references to most restrictive licensing terms. Licensing terms that are several years old no longer offer much help for determining the current value of the relevant patents and the underlying technology, which may have changed fundamentally in the intervening period. Lastly, BDI warns about overburdening decisions on the technically correct standard with economic questions.

Against this background, BDI is in favour of the Commission classifying unilateral prior disclosure of the most restrictive licensing terms only as a tool for preventing negative competitive effects through standard-setting agreements.

*Point 288, horizontal guidelines*

BDI encourages the Commission to rethink the assumption in point 288 according to which the inclusion of substitute technologies in a standard may limit intertechnology competition and is likely to give rise to restrictive effects on competition. First, it is today already the rule rather than the exception that agreed standards include not only essential but also substitute technologies. Second, it is difficult to understand why the inclusion of technology A in standard X should prevent a technology that can be substituted for A in standard Y. At most, a certain effect could arise if the relevant products have to meet standards X and Y cumulatively so that it would be more cost-efficient to include and use only one of the two substitute technologies.

Information needed for application of standards must be available to potential new market participants. One obstacle to this could be the sometimes very high selling prices for standardisation texts. Access to the texts should be simplified, so that small and medium-sized enterprises in particular also have the possibility to find out about standards.

*Point 314, horizontal guidelines*

The German version of this could be understood to mean that especially in the case of de facto industry standards special significance is assigned to market shares when assessing the magnitude of the remaining sources of actual competition. This cannot be the intention.

### **C. Comments on the draft R&D regulation (including the relevant section in the horizontal guidelines)**

#### **I. General comments**

The significance and many manifestations of cooperation between companies in the field of research and development and the resulting implications for competition call for a shared understanding of how to assess such cooperation agreements. The rules set out in the R&D regulation and the accompanying explanations in the Commission's horizontal guidelines should therefore be given an extremely positive evaluation: they make it easier for the companies involved to carry out a self-assessment and to manage R&D agreements. They also stimulate innovations and hence competition through exemptions.

However, this draft R&D regulation comprises a number of rules that attract our criticism. These are described briefly below.

#### **II. Individual comments**

##### ***1. Side agreements in R&D agreements which do not restrict competition***

BDI repeats its call for an unambiguous clarification in the horizontal guidelines that side agreements in R&D agreements which do not materially restrict competition despite imposing restraints on the partner should not be assessed in line with the requirements of the R&D regulation. Otherwise there would - even in the case of an R&D cooperation agreement between non-competitors which is completely unproblematic in terms of competition law - be a need for equal access to so-called background know-how in accordance with article 3(3) R&D regulation as soon as the R&D agreement contains a side agreement which does not materially restrict competition,

Side agreements which do not materially restrict competition are understood to be provisions which do not constitute the actual object of R&D agreements but which are directly linked to and necessary for their execution, e.g. the obligation not to carry out any R&D work in the same or a closely related area alone or with third parties during the validity of the R&D cooperation agreement. This already corresponds to the idea set out in the R&D regulation that such side agreements are generally exempt in accordance with article 1(2) of the existing R&D regulation, even in the case of cooperation agreements which are relevant for competition law.

Furthermore, such a clarification would fit in with the principle of immanent exception recognised in jurisprudence: if an R&D agreement is admissible as such under competition law and does not encounter any objections on antitrust grounds, this should also apply for any side agreements associated with the R&D agreement. Otherwise, the R&D cooperation agreement would fall due merely to a restrictive side agreement within the scope of the R&D regulation and this would make compliance with other requirements of the R&D regulation necessary. However, this does not seem justified.

Almost all R&D agreements between non-competitors – including those that are completely unproblematic in terms of competition law – regularly comprise agreements along the lines described above. The purpose of such side agreements is primarily to safeguard the success of R&D work by pooling forces in a research project, but not to constrain the competitive behaviour of the participating companies. In these cases, it cannot be the wish to apply article 101 TFEU and the requirements of the R&D regulation through the back door. This also corresponds to the explanations in the horizontal guidelines whereby only a very few R&D cooperation agreements fall within the scope of article 101(1) TFEU (point 123).

Side agreements in R&D agreements relevant for competition law, i.e. with material competition-restrictive effects, could continue to be exempt in accordance with article 1(2) R&D regulation.

## **2. Specialisation on research and development, article 1(12) R&D regulation**

According to article 1(12) R&D regulation, each of the parties must carry out some of the research and development activities. Under the specific wording of this provision, this does not include a scenario where *“one party carries out all the research and development and the other party merely finances these activities or exploits the results”*.

In our view, this provision is extremely problematic and jeopardises the incentive to carry out joint R&D activities generally. It is difficult to understand why financing should be less favourably regarded than the actual performance of the R&D work. For that reason, instead of the new version,

there should be a clarifying explanation in the text of article 2(11)(c) of the existing R&D regulation: “...c) *allocated between the parties by way of specialisation in financing, research, development, production or distribution*”.

This is particularly important because financing plays a central role in R&D plans: new products can only be developed and the corresponding projects can only be carried out if financing is secured. Accordingly, financing is just as important a component of joint R&D as the performance of the actual R&D work. Hence, the parties should also be able to benefit from the provisions of the R&D regulation if the contribution of one party is limited to a purely financial involvement in the division of work.

### **3. *Specialisation in exploitation, article 1(13) R&D regulation***

According to the draft wording of article 1(13) R&D regulation: “*each of the parties must carry out some of the exploitation of the results in the internal market*”. In particular: “*each party must carry out in the internal market some distribution activities regarding the contract products, for example, in relation to certain territories, customers or fields of use allocated to it*”.

In our view, this provision prompts major reservations. The parties should be free to determine how they exploit the results, in particular distribution of the contract products. This is also provided for in article 2(11)(c) of the existing R&D regulation (cf. “...c) *allocated between the parties by way of specialisation in research, development, production or distribution*”).

The new provision removes the incentive for parties to carry out joint R&D activities. The division of tasks relating to research, development, production and distribution is a central element for evaluation of R&D plans. Especially in cases where one of the parties brings a great deal of know-how and intellectual property into a joint R&D project, sole marketing by one party for a specified period can be particularly important. For this reason, the existing provision should be maintained – and supplemented to include financing.

### **4. *Concept of “potential competitor”, article 1(16) R&D regulation***

BDI is pleased that the Commission has specified the concept of “potential competitor” more closely in article 1(16) R&D regulation. A potential competitor is now an undertaking “*that, absent the research and development agreement, would, on realistic grounds and not just as a mere theoretical possibility, in case of a small but permanent increase in relative prices be likely to undertake, within not more than three years, the necessary additional investments or other necessary switching costs to supply a product,*

*technology or process capable of being improved or replaced by the contract product or contract process on the relevant geographic market”.*

However, we would be interested to know why the Commission has chosen a timeframe of three years, whereas point 10 of the horizontal guidelines talks about a potential market entry “within a short period of time” and point 27 of the guidelines on vertical agreements sets a period of maximum one year. It is also unclear what requirements are to be placed on the forecast as to whether an undertaking genuinely could or would invest in substitute or complementary products within the three-year period. The parameters that the European Commission deems relevant for the assessment should be clarified.

#### **5. Disclosure of all existing and pending intellectual property rights, article 3(2) R&D regulation**

Article 3(2) R&D regulation stipulates “*that prior to starting the research and development all the parties will 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*”.

BDI finds this disclosure obligation problematic. In particular, before research and development works starts it is often difficult to foresee what intellectual property rights will actually be relevant for the research and development plans and the results which emerge. Furthermore, verification of potentially relevant intellectual property rights is extremely difficult when there is a large patent portfolio, as well as very time-consuming.

Inasmuch, complying with this obligation seems hardly possible. Neither does the provision appear to be absolutely necessary, since relevant know-how (and probably patents as well) which are needed for exploitation of the results has to be licensed in any event in accordance with article 3(3) R&D regulation.

This obligation together with the resulting possibility of non-compliance conceals a potential liability risk for the parties. This is likely to reduce the incentive to carry out joint R&D activities.

In our opinion, the provision should therefore either be deleted or be reformulated in such a way that (a) it refers to the “indispensable” character of intellectual property rights for subsequent exploitation of the R&D-results – as is also the case in article 3(4) R&D regulation – and (b) only requires the parties to make reasonable efforts to identify relevant intellectual property rights and to disclose the rights identified on the basis of these efforts. Alternatively, thought could be given to a provision that requires ex post dis-

closure of additional relevant intellectual property rights identified during the course of the joint R&D.

#### **6. Access to pre-existing know-how, article 3(4) R&D regulation**

According to article 3(4) of the draft R&D regulation, “*each party must be granted access to any pre-existing know-how of the other parties, if this know-how is indispensable for the purposes of its exploitation of the results*”.

Under the definition contained in article 1(10), the concept of know-how encompasses “*a package of non-patented practical information*”. In other words, patents are excluded from the scope of “know-how”.

This raises the question of (i) whether the parties are obliged in any way to grant each other access to patents that are indispensable for exploitation of the results, or (ii) whether the parties have to disclose relevant patents but can make this dependent on payment of fair and non-discriminatory licence fees.

Furthermore, regarding the reciprocal disclosure of know-how, it must also be wondered whether the parties should make access dependent on payment of fair and non-discriminatory licence fees.

In light of these questions, a clarification seems desirable in the interest of legal certainty.

#### **7. Market share threshold and duration of exemption, article 4 R&D regulation**

BDI encourages the Commission to introduce a further safe harbour alongside the market share threshold in article 4(3) R&D regulation or at least in the horizontal guidelines, drawing inspiration from US practice. In our view, general reservations about competition should be ruled out if there are at least two further independent research projects with comparable resources as well as the R&D cooperation agreement under assessment. This view is also shared in the literature (e.g. Fuchs in Immenga/Mestmäcker, Wettbewerbsrecht EG/Teil 1, 4<sup>th</sup> edition, R&D regulation, point 95).

The proposed safe harbour provision would take proper account of the competition situation on the research and innovation market and would be sufficient without a market share assessment on the product markets. Where further independent research projects with comparable resources exist, it would be ensured that the proposed R&D cooperation agreement cannot materially restrict research and innovation competition. This would apply even if the R&D cooperation partners were to hold significant market shares on the relevant product market. Their market position on the relevant product market says nothing about how their market position should be assessed

with respect to the research competition for the new technology in question. The proposed safe harbour provision is in line with US practice. A corresponding provision is also contained in the “Antitrust Guidelines for Collaborations among Competitors” drawn up by the Federal Trade Commission and US Department of Justice (April 2000, page 26 et seq.).

If in 2000 the US antitrust authorities wanted to recognise a safe harbour only in the case of three further independent research projects, thought could now be given to setting this threshold at two further independent research projects. In most cases it can then be assumed that an R&D cooperation agreement, even one between competitors and with joint exploitation, is eligible for exemption.

Lastly, the proposed safe harbour provision would mean greater legal certainty for companies, even if it will not always be easy to identify comparable research projects in individual cases.

#### **8. *Distribution restriction, article 5(d) R&D regulation***

Under the currently valid provision in article 5(e) R&D regulation, a restriction on the freedom of involved companies regarding the choice of customers to be served is possible for the exempted timeframe of seven years from the first time that the contract products are placed on the market. The provision allows a restriction on both active and passive distribution.

By contrast, according to article 5(d) of the draft R&D regulation, only a restriction on active distribution would still be possible whereas passive distribution could no longer be restricted.

However, in BDI’s view, it is precisely the possibility to restrict distribution to certain customers for a certain period of time without distinction that constitutes a fundamental incentive for carrying out joint R&D. This incentive is also legitimate from the angle of competition law since there is a major risk of passive sales especially in the case of innovative products developed in a joint R&D project. A strong incentive for joint R&D and the associated product innovations will continue to exist only if there are comprehensive restriction rights. The proposed new provision diminishes these innovation incentives and hence endangers the implementation of R&D plans generally. In order not to endanger implementation of joint R&D plans, the old provision should be maintained here.

#### **D. Comments on the draft specialisation regulation**


According to article 3 in conjunction with article 1(7) specialisation regulation, a second market share threshold of 20 % on the downstream market would be introduced for specialisation agreements on the production of in-

termediary products which one or more of the parties fully or partly use captively for the production of downstream products which are sold by these parties on the commercial market. The introduction of a second market share threshold is similar to the approach that the European Commission has already applied in the framework of the new vertical block exemption regulation.

We have already voiced our criticism of the concept of market share thresholds. The scope for exemption under the specialisation regulation would be restricted by the introduction of an additional threshold, and the practical relevance of the specialisation regulation would be diminished. Moreover, the introduction of the second threshold would lead to a further fragmentation of the conditions for application of block exemption regulations. We therefore recommend that the Commission refrains from introducing a second market share threshold.



Niels Lau



Nadine Rossmann