

RESPONSE TO CONSULTATION ON THE HORIZONTAL COOPERATION GUIDELINES AND THE RELATED BLOCK EXEMPTIONS

1. INTRODUCTION

- 1.1 Clifford Chance LLP welcomes the opportunity to comment on the draft specialisation and R&D block exemptions and the draft guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union ("**Article 101**") to horizontal cooperation agreements (the "Guidelines").
- 1.2 Our comments are based on the experience of lawyers in our Global Antitrust Group of advising on horizontal cooperation agreements and cartel investigations. With offices in eleven EU countries, and having advised on these issues in all major jurisdictions in the EU and worldwide, that experience is substantial and wide ranging. However, the comments in this response do not necessarily represent the views of every Clifford Chance lawyer, nor do they purport to represent the views of our clients.
- 1.3 We consider that, on the whole, the proposed changes to the block exemptions are broadly sensible, and that the draft Guidelines have been redrafted in a way that accurately and clearly reflects current economic and legal thinking, and provide useful new guidance in a number of areas, in particular the exchange of information between competitors. We have therefore focused our comments on particular areas where we consider that important changes should be made, and particular issues that we have encountered when advising in this area which we would like to see better reflected in the Guidelines.

2. THE SPECIALISATION BLOCK EXEMPTION

Definition of Potential Competitor

- 2.1 The definition of "potential competitor" in the draft Specialisation Block Exemption (SBE") refers to market entry "*within not more than three years*", which contrasts with the definition at paragraph 10 of the draft Guidelines which refers to market entry "*within a short period of time*". We recognise that using the latter, less precise, formulation in the SBE would perhaps create a degree of legal uncertainty as to whether the SBE applies. However, we consider that this would be much less than the degree of uncertainty that would be inherent in speculating as to the likelihood of market entry over such a long period. Accordingly, it would, in our view, be preferable to refer simply in the SBE to "a short period of time", and to elaborate in the Guidelines on how that may vary between undertakings operating in different sectors. That would be consistent with the approach adopted in the new Vertical Restraints Block Exemption.

Market Share Thresholds

- 2.2 The market share threshold under Article 3 of the draft SBE now requires a market share of 20% or less on any "relevant market", which is defined to include the

downstream market if the specialisation products are intermediary products which one or more of the parties uses captively, fully or partly, for the production of downstream products. While this approach in some way aligns itself with the new upstream and downstream requirements outlined in the new VBE, it raises two concerns for us.

- 2.3 First, this new downstream requirement for specialisation products - which would exclude a significant number of specialisation arrangements from block exemption – appears to be irrational. Recital 10 of the SBE states that the purpose of the new threshold is to address the possibility of "input foreclosure". However, input foreclosure considerations cannot possibly, in our view, justify this change. In particular, if the parties' combined market share of the upstream market is less than 20%, a full 80% of the market will remain accessible to downstream rivals. In such circumstances, the parties would have no ability to unilaterally increase prices for the specialisation products or otherwise restrict their supply to downstream purchasers, even if they had the incentive to do so.¹
- 2.4 Second, the Commission has provided a year of interim protection (until 31 December 2011) for parties who comply with the current SBE, but who do not comply with the conditions under the new SBE. We believe that the Commission has not properly taken into consideration the major infrastructure changes that many parties will have implemented as a result of a specialisation arrangement (such as closure of certain production units by one party and a corresponding expansion of those of the other). It seems to us unreasonable, and outside the legitimate expectations of these parties, that they should have merely a year in which to reconsider and, potentially, restructure their production arrangements. We suggest that any *current* specialisation arrangement deemed acceptable under the current SBE and involving parties whose combined market share remains below 20%, should continue to benefit from this exemption for the contractual duration of the envisaged specialisation, or five years, whichever is the shorter period.

Definition of joint distribution

- 2.5 We understand that the Commission has previously taken the view that the exception allowing the fixing of prices in the context of joint distribution (Article 5(1)(a) of the current BE / Article 4(a) of the draft BE) did not apply in the context of joint sales of jointly produced natural gas,² on the basis that, notwithstanding the extensive physical pipeline distribution network of the parties, their arrangement amounted to "joint coordination of sales" rather than joint distribution. That case - and the absence of explanation of the distinction between joint distribution and joint sales - created a degree of uncertainty for a number of our clients that cooperate in the sale of products

¹ Moreover, there appears to be no scope for demand foreclosure concerns, as the upstream market share threshold would be exceeded long before any such foreclosure of demand became anticompetitive.

² See "*Vertical and horizontal restraints in the European gas sector – lessons learnt from the DONG/DUC case*", Dominik Schnichels and Fabien Valli, Competition Policy Newsletter, Number 2, Summer 2003.

with "non-traditional" distribution formats. Consequently, we suggest that the definition of "distribution" in the SBE be expanded to clarify what forms of contractual arrangement are covered or excluded, or that explanation of this point is contained in the Guidelines. For example, it might be clarified that the meaning of distribution for these purposes requires regular and repeated contacts with customers, and excludes circumstances where all or substantially all of the future production of the specialisation products is sold at the same time under long-term agreements.³ This comment is of equal (and possibly greater) relevance to the definition of distribution in the R&D Block Exemption.

- 2.6 In addition, Article 1(15) of the SBE states that distribution is carried out "jointly" where the parties do so by way of a joint team, organisation or undertaking, or appoint an independent, non-competing third party to do so. While we recognise that this is largely a reformulation of the criteria under the current BE, we query whether it is rational to exclude the possibility of distribution by one of the parties, on behalf of all parties to the JV, as the competitive effect would appear to be much the same.

3. THE R&D BLOCK EXEMPTION

- 3.1 See our comments relating to the SBE in paragraphs 2.1 and 2.5 above, which apply equally to the R&D BE.

Open Disclosure of IPR prior to R&D

- 3.2 We note that Recital 12 of the R&D BE states that the benefit of the BE will only be available where the parties agree before the project to disclose all existing and pending intellectual property rights in so far as they are relevant for the exploitation of the results by the other party. We assume that this has been included because the Commission does not believe R&D projects should be commenced while there is a prospect that, further down the line, an (undisclosed) IPR could lead to "hold up" issues regarding the way in which a party could exploit the results.
- 3.3 However, by introducing such requirements, it seems the Commission has not considered the potentially negative impact that this could have on legitimate R&D projects that would be viewed as pro-competitive. We would ask the Commission to consider the impact of these rules and to reassess whether the requirement for up-front disclosure is appropriate in the context of the R&D BE, given the relatively low market shares that the parties must enjoy in order to fall within its scope. In particular, an obligation to disclose all existing and *pending* IPR that is necessary for the project, places a very large burden on the IPR holder to disclose rights which are, inherently, extremely sensitive in nature and, in relation to those pending, may still be at a stage where disclosure is not considered appropriate or feasible, if the IPR is to be granted

³ In the past, Commission officials have, speaking in a private capacity, advanced this as one justification for the decision to deny applicability of the block exemption in the *DONG/DUC* case.

successfully. Moreover, it may be very difficult to assess from the beginning of project exactly which IPRs will be necessary.

- 3.4 Should the Commission nevertheless decide to implement a transparency requirement in the context of the R&D BE, please see our suggestions in paragraphs 4.16 to 4.18 below for possible improvements to the transparency obligations.

4. **THE HORIZONTAL GUIDELINES**

Agreements between joint ventures and parent companies

- 4.1 The Commission's move in paragraph 11 of the draft Guidelines is welcomed as bringing useful – and long overdue – clarity on the applicability of Article 101 to commercial relations between joint ventures and their parent companies. However, the Guidelines could usefully explain how this approach is also consistent with:

4.1.1 previous cases pursued by the Commission (such as *Gosme/Martell-DMP*⁴) in which joint ventures have been treated as separate undertakings to their parent companies. For example, the Commission might explain that even if a parent company has the *ability* to exercise decisive influence over a JV (i.e. the relevant standard under the EU Merger Regulation), an agreement with it might nevertheless fall within the scope of Article 101 if it does not, in fact, exercise that influence.⁵ Alternatively, the Commission might explain that certain old cases such as *Gosme/Martell-DMP* are no longer a useful indicator of the Commission's interpretation of the concept of an undertaking; and

4.1.2 the requirement under the EU Merger Regulation that a full function JV must perform "all the functions of an *autonomous* economic entity" (emphasis added). For example, the Commission could point out that the full function criteria do not require *actual* autonomy. In addition, the Guidelines might explain that certain agreements between a parent and a full function JV - such as an agreement setting the day-to-day prices that the JV will charge for its products - may remove the ability of a JV to perform as if it were autonomous, and so call into question its "full functionality", with resulting implications for the way in which it is assessed under competition law.

- 4.2 In addition, paragraph 11 does not cover the scenario in which a company has (and exercises) decisive influence over a number of joint ventures in the same sector. It is implicit in paragraph 11 that (subject to our comments above regarding the impact of an agreement on a JV's full functionality) agreements between the parent and each JV would not fall within the scope of Article 101. However, it is not clear to us whether

⁴ OJ 1991 L185/23

⁵ For consistency, the Commission could also usefully note that in such circumstances a parent company will not be held liable for competition law infringements carried out by the joint venture.

collusion between the relevant JVs would be caught. In our view, the same principle should apply - i.e. they should not be caught, on the basis that they and their common parent form one and the same undertaking – as: (i) if they are full function JVs then the possibility of such collusion or coordination will have been taken into account in any prior merger control assessment; and (ii) if they are not full function, the arrangements will be viewed as a series of agreements between their parent companies, which will fall for assessment under Article 101 in any event.

Threshold for a Restriction of Competition

- 4.3 We note that at paragraph 24, the effects-test states that a restriction of competition must at least be likely. At paragraph 26, it states there must be a "reasonable degree of probability". Given the fact that parties must self-assess whether there is a restriction of competition, it would be very helpful if the Commission could clarify this threshold. For example, should the probability be "more likely than not", i.e. above 50%?

The Counterfactual

- 4.4 Paragraph 28 of the draft Guidelines states that a cooperation between competitors that would not be able independently to carry out a project themselves will not normally give rise to restrictive effects on competition. We consider that further explanation of this principle is necessary. In particular, there may be many circumstances in which it is conceivably possible for a party to carry out a project on its own, but where it would not do so in practice, for example because of the high costs or risks involved. In advising on this point, we have found the factors set out in the Commission's (no longer applicable) 1993 Cooperative JV Notice to be a useful reference point.

Exchange of Information between Competitors

- 4.5 We welcome the inclusion in the Guidelines of guidance on which exchanges of information are permissible and which are prohibited.
- 4.6 However, given the draconian consequences for companies of being found to have exchanged information with the object of restricting competition, we do not consider the two paragraphs devoted to this subject (67 and 68) to be sufficient. In its recent judgment in the case of *T-Mobile Netherlands*⁶, the European Court of Justice (ECJ) stated that even a single, isolated exchange of information may amount to a restriction of competition by object if it is "*capable, with regard to its economic and legal context, of resulting in a restriction, prevention or distortion of competition*". To say that this offers little useful guidance is an understatement (the scope of arrangements that are "capable" of restricting competition is seemingly the same - or even *wider* -

⁶ Case C-8/08 *T-Mobile Netherlands and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, judgment of 4 June 2009.

than that of agreements that actually or potentially do so). In light of this unsatisfactory case law, the Commission should take this opportunity to expand upon:

- 4.6.1 the "*information exchanges on current conduct that reveal intentions on future behaviour*" referred to in paragraph 68. The lack of any clear examples of such information exchanges will result in harmful legal uncertainty for bodies such as trade associations and third party data aggregators that routinely collect current market information; and
 - 4.6.2 the "*other types of information exchanges (mainly private individualised exchanges between competitors on prices and market shares) whose aim is to restrict competition on the market*", also referred to in paragraph 68. For example, in what circumstances would an exchange of information regarding costs – the type of information exchange that was involved in the T-Mobile Netherlands case – be viewed as a restriction by object?
- 4.7 In addition, paragraph 82 of the draft Guidelines state that "*[i]n general, exchanges of genuinely public information are unlikely to constitute an infringement*" (emphasis added). Neither the remainder of the section nor the example at paragraph 103 assist in outlining what, in the Commission's view, could be an exchange of genuinely public information (as that term is defined by the Commission, i.e. excluding public information that is not equally easy to access for everyone) that would constitute an infringement. In our view, if the information is genuinely public, there can be **no** instances when it will constitute an infringement.

Production Agreements

- 4.8 Paragraph 160 of the draft Guidelines states that joint production agreements which also involve commercialisation functions "*carry a higher risk of restrictive effects*". Paragraph 161 goes on to state that "*in case of an integrated joint production and joint commercialisation agreement the setting of sales prices for the products subject to the agreement does not necessarily restrict competition, provided that the price-fixing by the joint venture is necessary for integrating the production and commercialisation functions of the co-operation agreement*". A similar statement is carried over from the existing Guidelines in paragraph 155.
- 4.9 We have, in the past, found the requirement for the necessity of price fixing for the integration of functions (the "integration test") to be insufficiently clear to provide comfort that certain structures of cooperation will not be viewed as price fixing. Given the Commission's current fining policy for price fixing infringements, that lack of clarity is likely to deter, and to have deterred, some cooperation arrangements that would have benefits for competition and consumers. Accordingly, we consider that the Commission should expand upon what is meant by integration in this context, preferably with reference to examples.

- 4.10 In particular, the economic rationale for the integration test is not obvious. Does the statement in paragraph 161 mean that if the integration of commercialisation functions cannot itself be said to be necessary for the sale of the products (e.g. if the parties could off-take their production volumes and market them independently) there may nonetheless be no restriction of competition if price fixing is necessary for that integration? Or would it be more appropriate to assess such a scenario with reference to efficiencies under Article 101(3)? Moreover, to what degree must integration occur for the integration test to be satisfied, and in respect of what activities and assets?
- 4.11 A related problem is that it is rarely possible to say that price fixing is necessary *for* the integration of functions. For example, salespersons in an integrated commercialisation network could be told that party A's products are to be sold at a price set by party A, and party B's (identical) products are to be sold at a different price set by party B. In practice, this will usually be unworkable, as the higher priced products would remain unsold, and the parties will therefore inevitably align their prices. However, it is difficult to say that price fixing is necessary *for the integration* of the commercialisation functions. Rather it is the necessary *result* of that integration.

Purchasing Agreements

- 4.12 Purchasing arrangements almost invariably result in lower prices for the purchasers. As a result, accusations of anticompetitive buyer power are most frequently levelled by those seeking to protect their profits. Moreover, provided purchasers are not economically irrational or blind to the demands of their customers, then in the absence of downstream market power, they have no interest in forcing suppliers out of the market, or causing them to reduce their range below that which they can profitably use or resell. Consequently, we consider that if purchasers who have no combined downstream market power decide to seek better prices by pooling their demand, the Commission should be very cautious of intervening. In our view, the draft Guidelines do not strike the right balance in this respect (and neither do the existing Guidelines).
- 4.13 In particular, we consider that the market share thresholds set out in paragraph 203 of the draft Guidelines below which anticompetitive effects are deemed unlikely should be amended. Instead of a 15% threshold for the parties' combined market share on both the purchasing market and selling markets, we suggest that the market share threshold for the purchasing market should be increased to at least 20%. That would be consistent with paragraph 199 of the draft Guidelines, which recognises that "*joint purchasing arrangements are less likely to give rise to competition concerns when the parties do not have market power on the selling market(s)*".
- 4.14 In addition, the statement that potentially restrictive effects may arise if commonality of costs is a "*significant proportion of total costs*" (in paragraph 122 of the existing Guidelines) now refers instead (in paragraph 209 of the Draft Guidelines) to "*a significant proportion of parties' variable costs*" (emphasis added). We do not agree with this approach. Firms take into account the total cost of making a product when deciding how it should be priced. Moreover, factors that drive a firm's competition of

pricing are not limited to input costs, but extend to a range of other efficiencies, cost advantages and commercial strategies. For companies active in sectors that involve high fixed costs and very low variable costs (such as telecommunications), the Commission's proposed approach would have the effect of precluding any attempt to achieve efficiencies in procurement, to the ultimate detriment of consumers.

- 4.15 We also note that in the current Guidelines, at paragraph 122, it states that: "*[r]estrictions on these markets are more likely if the parties will achieve market power by coordinating their behaviour and if the parties have a significant proportion of their total costs in common.*" In other words, commonality of costs in isolation is not a cause for concern, but market power combined with commonality of costs could raise concerns. In the draft Guidelines, a separate section (at paragraph 208 onwards) has been dedicated to a review of commonality of costs. We assume that the Commission remains of the view that this should continue to be assessed with reference to market power (which is discussed in the section prior to this, at paragraphs 203 to 206). However, it would be helpful if this were clarified. We note that at paragraph 238 (within the section on commercialisation agreements) the Commission states "*[c]ommonality of costs only increases the risk of collusive outcome if the parties have market power and if the commercialisation costs constitute a large proportion of the variable costs related to the products concerned.*" We suggest that a similar link between these two concepts is included in relation to paragraph 208.

Standardisation Agreements

Transparency in Standard Setting Processes

- 4.16 The draft Guidelines promote increased transparency in the disclosure of essential IPR in the development of standards. We agree that, if properly implemented, such transparency requirements are likely to have broadly beneficial effects for the efficient and cost effective development of standards. However, as regards standards setting organisations (SSOs) in particular, the Commission will no doubt appreciate that the draft Guidelines touch on some legal issues not yet resolved by the EU Courts. In particular, if an SSO fails to establish a process that precludes the possibility of a subsequent abuse of a dominant position (in the form of an IP "hold up"), is there a sufficient causal link between the anticompetitive effects that result from any such abuse and the agreement between the SSO's members, or is the abuse an intervening cause? If the analysis that underpins the draft Guidelines in this area is that the necessary causation does invariably arise, that should be made explicit, in order that companies and their advisers can assess for themselves the risk that an omission of this nature falls within the scope of Article 101(1).
- 4.17 In paragraph 281 of the draft Guidelines, we consider that additional clarity could be given to the terms "good faith disclosure" and "reasonable efforts". Particularly in the context of large, complex standards, the requisite level of disclosure can be difficult to

agree among stakeholders, and we consider that the Commission should make it clear that disclosure should be:

- (a) timely (i.e. before the incorporation of the technology into the proposed standard wherever possible, rather than before final agreement on the overall standard, as the process is often staged). This requirement should be balanced against the comments made in paragraphs 3.2 and 3.3 above, which also have application, although on a potentially more limited basis, in standardisation;
- (b) the responsibility of the licensor, incorporating an obligation to act in a bona fide manner to update and correct as far as possible any claims for essential technology that either arise or fall away during the lifetime of the finalised standard; and
- (c) not taken to imply an imposition of a patent search requirement on licensors.

4.18 An alternative to specific disclosure can be found in wide-ranging commitments to license all technically essential technology relating to the standard on FRAND terms, as required under paragraph 282 of the draft Guidelines. Such broad commitments can help in avoiding concerns with unpublished patent applications, and we consider that the Commission could usefully encourage the use of such declarations at the outset of the standardisation process, rather than at any time during the process. We consider that the Commission could address potential criticisms of such broad-ranging obligations by clarifying that these can be usefully limited by the possibility for the licensor to identify property rights to which the commitment would not apply or to which the commitment would apply only within the field of use of the standard itself. Such blanket commitments should also, in our view, include an ongoing responsibility on the licensor to act in a bona fide manner to later specifically list the technology covered, and to update and correct as far as possible any claims for essential technology that either arise or fall away during the lifetime of the finalised standard.

Access to the Standardised Technology

4.19 We note the Commission's clarification on the requirement that the FRAND commitment should survive transfer of the intellectual property involved, in paragraph 286 of the draft Guidelines. In a similar vein, we consider that the Commission should expressly clarify that because open and transparent access to the standard and the technology it incorporates is considered vital for compliance with Article 101 TFEU, companies seeking injunctions to prevent the use of technology subject to a FRAND commitment, pending determination of the licensing terms, may breach EU competition law. One can foresee certain objective justifications for seeking such injunctions (such as a counter-claim against another party refusing to license technology equally subject to a FRAND commitment, or against a licensee who refuses to license infringed technology that is offered on a bona fide FRAND basis). However, the use of injunctive relief to extract high royalties from prospective bona fide licensees seeking licenses on a FRAND basis is perhaps one of the clearest

forms of abuse of hold-up power, and we consider that this issue could usefully be clarified in the draft Guidelines.

Disclosure of Licensing Terms

- 4.20 Again, we welcome the Commission's statement that the unilateral ex-ante disclosure of licensing terms would not lead to a restriction of competition captured by Article 101(1). However, we believe that the Commission could further clarify that:
- (a) the value of such disclosures is limited unless they are made when alternatives to the specific technologies held by the licensor could still be included in the standard (i.e. not simply before the standard is adopted); and
 - (b) discussion of such disclosed terms within the standard-setting organisation can take place, as long as the conditions of Article 101(3) are also met. This would bring EU law firmly into line with US antitrust practice, which subjects such discussions to a "rule of reason" analysis before condemning them as anti-competitive.

Standard insurance policy terms

- 4.21 The Commission recently withdrew standard policy terms from the scope of the block exemption for certain agreements in the insurance sector, ostensibly on the grounds that this issue of standard terms is not specific to the insurance industry. It is therefore disheartening that the Commission has identified a category of standard terms most likely to give rise to concerns as being those terms which define the product being sold, and has given the insurance sector as the only example of this being the case (see paragraphs 263 and 297 of the draft Guidelines). Given that standard terms are common across the industry, we consider that the example in paragraph 323 is not sufficient to clarify when standard terms in the insurance sector are not acceptable.

Other remarks

- 4.22 The draft Guidelines cover standardisation agreements which "*have as their primary objective the definition of technical or quality requirements with which current or future products, production processes, services or methods may comply*". However, some of the issues that are touched on in this section are relevant to a much wider category of cooperation and joint venture agreements than those which simply establish technical or quality standards, namely those joint ventures in which the parties are cooperating with a view to establishing the preeminent player (be it a product, service, platform, software etc.) in a market that, due to network effects and consumer or user preferences, is inherently likely to "tip" towards one solution only. Such arrangements frequently involve parties who are active upstream or downstream of the joint venture, and can raise complex issues, particularly where a degree of commitment from those parties is critical to the success of the venture, but excessive inclusiveness risks stifling rival ventures, or involving parties with conflicting

interests in other ventures. A recent example is the development and commercialisation of high definition DVD formats and devices (Blu-Ray and HD-DVD), and the backing of those respective technologies by major content providers.

- 4.23 In that light, we ask the Commission to consider whether the guidelines might be expanded to address such situations, either as a separate standalone section, or in the section on R&D cooperation.
- 4.24 We note that all references to HHIs, as a means of assessing market concentration, have now been removed from the Guidance. For example, paragraph 164 now states "*with a moderate concentration*" and no references are made to HHIs to assist in assessing this level of concentration. It would be very helpful if the Commission could, at the very least, provide safe-harbour levels relating to market concentration with reference to HHIs. We see no reason why this should not be possible, given the fact that under the ECMR, concentration in markets is still assessed inter alia with reference to HHIs.

CLIFFORD CHANCE LLP
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