

CUATRECASAS, GONÇALVES PEREIRA

In this document, Cuatrecasas, Gonçalves, Pereira submit its comments to the European Commission (the "Commission") about the revised rules to assess horizontal cooperation agreements under EU competition law. We provide our opinion based on our experience in advising clients from all sectors on issues related to horizontal cooperation agreements. We have prepared these comments exclusively for the purpose of the public consultation launched by the Commission, regarding its draft regulations and guidelines on horizontal cooperation.

These comments are not confidential.

A. Suggestions

1. The Guidelines should pay special attention to cases of information exchanges between undertakings that are not competitors, but in which the information may be used at a level where the parties compete. We propose two different examples of this:
 - a) A distributor starts to manufacture products similar to those that one of its suppliers (i.e., a supplier-manufacturer) manufactures. In this case, although the distributor competes with the supplier-manufacturer, it benefits from information provided by the latter to launch and sell its own products on the market. As a result, the supplier-manufacturer has fewer incentives to innovate, leading to an adverse impact on competition.

In this respect, paragraph 27 of the recently published Guidelines on Vertical Restraints states that Article 2(4) of the Block Exemption Regulation on Vertical Restraints explicitly excludes "vertical agreements entered into between competing undertakings" from its scope of application. Instead, the Commission's Horizontal Guidelines will handle these agreements as regard possible collusion effects. In addition, given the Commission's statement that "a distributor that provides specifications to a manufacturer to produce particular goods under the distributor's brand name is not to be considered a manufacturer of such own-brand goods," it obviously does not consider the distributor and the manufacturer to be competitors in this scenario. In any case, the Horizontal Guidelines should mention this scenario as the

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distributor launches products similar to those of its supplier-manufacturer, and, therefore, they would act and compete directly in the same market.¹

Measures must be taken to combat the restrictive effects arising from the distributor's ability to access sensitive information about the supplier-manufacturer. Such measures must ensure that the staff in the distributor's marketing department accessing the supplier-manufacturer's information which is necessary to launch the latter's products on the market do not pass this information on to the staff that "produce" the private label products (e.g., using Chinese walls). Given that the distributor and the supplier-manufacturer will compete in the same market, they must do it at arm's length, and the distributor must not use the information that he receives from the supplier-manufacturer to launch its own products. In these circumstances the private label product would thus be launched on the market at a later stage, enabling the supplier-manufacturer to be rewarded for its innovative efforts and customers to recognize the originator of such innovation. If successful, the new product will be subject to competition from private label in any case, but on a fairer basis.

- b) We have been confronted to situations in which certain legal provisions have been used (or better said abused) by a competitor against another one for anticompetitive purposes. In these cases it has proven extremely difficult to obtain a judicial decision declaring illegal the exercise of such right in the absence of a clear cut precedent or provision. A good example can be found in the exercise of rights derived from a minority shareholding in a competitor company, to gain access to sensitive information about the competitor company and use it for anticompetitive purposes. Transferring information to companies with minority shares in a competitor company may violate Article 101 TFEU, if the information enables these minority shareholders to, directly or indirectly, coordinate their behavior with the company in which they hold the minority stake in the markets where they compete, or collude with another competitor company that does business with the competitor company.

¹ The borderline between distributor brands and producer brands seems to be diluting over time. Indeed, distributors frequently categorize their own brands (e.g., premium and first price.). Some premium distributors' brands could be considered competitors of producers' brands.

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We believe that the inclusion of an explicit reference in the Guidelines to these situations and their capability to hinder competition would be helpful and would provide some guidance to better confront these situations before national judges. A similar problem may arise in the case of joint-venture partners who are also competitors in other markets.

B. Research and development (“R&D”) agreements

2. The treatment of passive sales in the draft R&D Block Exemption Regulation (“R&D BER”) differs from that in the Technology Transfer Block Exemption (TTBER). The draft R&D BER prohibits agreements that restrict the territory into which or the customers to whom parties may passively sell contract products or license contracts, while the TTBER includes exceptions to these prohibitions, e.g., by allowing restrictions on passive sales into territories that are reserved for the other party (the licensor or another licensee). As R&D agreements between non competitors are not more restrictive than agreements whereby a technology owner licenses its technology to the (non-competitor) licensee, for the sake of coherence, the Commission should reconsider adapting the strict approach in the draft R&D BER to the more flexible approach of the TTBER for cases involving non-competitors cooperating on R&D matters.
3. Paragraph 132 of the Guidelines states that R&D cooperation concerning entirely new products is unlikely to cause restrictive effects on competition, unless only a “limited number” of credible alternative R&D poles exist. We believe that the Commission should explicitly indicate that a “limited number” of R&D poles will not necessarily cause restrictive effects that outweigh the benefits of cooperation as, in cases where there are few competing poles, it may be necessary to join efforts to ensure successful innovation (e.g. in the pharmaceutical industry where companies may not engage into further R&D -phase 2- if they fear that they will not succeed and lose their investment).

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4. Paragraph 175 of the Guidelines states that joint-production agreements, under which parties share data that they do not need to produce jointly, e.g., exchanging information about prices and sales, are less likely to meet the conditions of Article 101(3) TFEU. For the sake of coherence, the Commission should qualify this statement, considering that under Article 4(b) of the draft block exemption, the parties to joint-production agreements including joint distribution may agree to establish sales targets.