

## **EVERSHEDS LLP**

### **RESPONSE TO EUROPEAN COMMISSION CONSULTATION:**

#### **GUIDELINES ON THE APPLICABILITY OF ARTICLE 101 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION TO HORIZONTAL CO-OPERATION AGREEMENTS**

##### **1. INTRODUCTION**

1.1 Eversheds LLP welcomes the opportunity to respond to the European Commission's (the "Commission") consultation on the revised rules for the assessment of horizontal cooperation agreements under EU competition law.

1.2 This Response is set out as follows:

- General Comments
- Application of Article 101 of the Treaty on the Functioning of the European Union ("TFEU") to intra-group agreements
- Actions Encouraged by Government Agencies
- Information Exchange
- Standardisation Agreements

1.3 This Response does not contain confidential information.

1.4 Our comments are limited to the proposed guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements (the "Draft Guidelines").

##### **2. GENERAL COMMENTS**

2.1 Eversheds LLP welcomes the publication of the Draft Guidelines by the Commission. In particular, we welcome the addition of new guidance relating to information exchange and standardisation. These are both areas of increasing importance in a digital era, where the jurisprudence of the European and national courts and regulators has developed significantly in recent years, and where guidelines can therefore play a valuable role in drawing together the relevant precedents and providing guidance as to their application.

2.2 We do, however, have suggestions to improve a few areas of the Draft Guidelines. We have limited these to high level comments.

### 3. APPLICATION OF ARTICLE 101 TO INTRA-GROUP AGREEMENTS

3.1 At paragraph 11 of the Draft Guidelines, the Commission provides guidance as to the treatment under Article 101 TFEU of intra-group agreements. In principle we welcome guidance as to the circumstances in which, in the absence of 100% (or even majority) ownership, a parent company and subsidiary (or two sister companies) might nonetheless form part of one and the same economic undertaking for the purpose of the application of Article 101 TFEU. However, we have reservations in relation to the Commission's proposed treatment of jointly owned joint venture companies.

3.2 Paragraph 11 provides as follows:

*...As a joint venture forms part of one undertaking with each of the parent companies that jointly exercise decisive influence and effective control over it, Article 101 does not apply to agreements between the parents and such a joint venture, provided the creation of the joint venture did not infringe EU competition law...*

#### **Concerns with the Commission's suggested approach**

3.3 As a preliminary comment, we note that the Commission's wording implies that a joint venture can form part of the same economic undertaking with *each of* two distinct undertakings, which we consider is not right. If the Commission intended to mean that the joint venture forms part of the same economic undertaking as *one of* the parent companies, then again we consider this is not right in the absence of further evidence that *that* parent company exercises decisive influence.

3.4 We acknowledge the *Avebe*<sup>1</sup> case referred to by the Commission in this regard. In that case, the General Court confirmed that in the case of a 50/50 unincorporated joint venture which lacked legal personality and whose parent entities had joint management power, an infringement decision should be addressed to each of the parent entities rather than to the joint venture. However, the *Avebe* case is not, in our view, a general statement of the law as to the circumstances in which a parent company and joint venture form one and the same economic undertaking, but is specific to its facts. First, the case considers which group company is the appropriate addressee of an infringement decision rather than the question of whether two companies are capable of entering into an agreement between undertakings (on which, see further below). Secondly, since the joint venture in that case had no legal personality, had the Commission not been able to address the decision to the parent companies, there would have been no legal entity to whom to address the infringement decision; i.e. this decision allowed the Commission to solve a specific problem.

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<sup>1</sup> Case T-314/01 *Avebe* ECR II-3085

- 3.5 However, the position proposed by the Commission does not reflect the position under previous (and still applicable) decisional practice, which provides that agreements between a parent company and a joint venture can, depending on the factual context, be subject to Article 101 TFEU. The key question is whether the companies form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market.<sup>2</sup> There is a presumption in the case of a *wholly owned* subsidiary that its commercial policy is decisively influenced by its parent so as to constitute a single undertaking, although even this is not conclusive<sup>3</sup>. It seems that this presumption may even apply in cases where a subsidiary is not quite wholly owned<sup>4</sup>. In other circumstances, however, it is for the party seeking to prove that parent and subsidiary comprise a single undertaking to adduce evidence that the parent exercises decisive influence over the subsidiary's commercial policy.
- 3.6 For example, in the case of Gosmé/Martell-DMP<sup>5</sup>, the Commission found that a joint venture (DMP) and its parent companies were independent undertakings. In that case, Martell and Piper-Hiedsieck, both producers of champagne, were joint 50/50 owners of DMP. Each parent company held half of the voting rights, made up half of the supervisory board and Martell and Piper-Hiedsieck products were invoiced to wholesalers on the same documents as DMP products. However, DMP distributed brands not belonging to its parent companies and it also had its own sales force who alone concluded the contract of sales with the French buying syndicates. The Commission concluded that in these circumstances, and notwithstanding the ties between the two companies, Martell and DMP were independent undertakings. An agreement between Martell and DMP to prevent parallel imports was therefore found to infringe what was then Article 81 EC. Similarly, in *IJsselcentrale*<sup>6</sup>, four electricity generating companies and their jointly owned subsidiary were found by the Commission not to be a single economic entity.
- 3.7 We make no comments as to the correctness or otherwise of the approach by the Commission in these decisions. Nonetheless, these decisions are at odds with the approach proposed in paragraph 11 of the Draft Guidelines.

### **Problems with the current law**

- 3.8 In our view, currently there is a gap/inconsistency between the application of the EC Merger Regulation (the "ECMR") and the application of Article 101 TFEU. Specifically, the ECMR applies to concentrations having a Community dimension,

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<sup>2</sup> Case T-102/92 *Viho v. Commission* [1995] ECR II-17

<sup>3</sup> Case T-354/94 *Stora Kopparbergs Bergslags v. Commission* [1998] ECR II 2111 confirmed by the ECJ in Case C-286/98P *Stora Kopparbergs Bergslags v. Commission* [2000] ECR I-9925.

<sup>4</sup> Case T-168/05 *Arkema SA v. Commission*, paragraph 70, currently under appeal Case C-520/09P.

<sup>5</sup> OJ [1991] L185/23

<sup>6</sup> OJ [1991] L28/32

which can include a "full function" joint venture; where such a concentration is declared compatible with the common market. Such a declaration also covers restrictions directly related and necessary to the implementation of the concentration (referred to as "ancillary restraints"). I.e. Article 101 does not apply to ancillary restraints in the context of a merger.

- 3.9 This means, however, that even where a concentration falls within the jurisdiction of the ECMR, an agreement between the parent company and its subsidiary (or between parent companies and a joint venture) may be subject to the competition rules if (i) the parties are not considered to be one and the same undertaking, and (ii) the agreement goes beyond what is permitted under the ancillary restraints doctrine. Put simply, a situation can arise where a parent company is treated as having decisive influence for the purposes of the application of the ECMR, but not for the subsequent application of the competition rules.
- 3.10 We appreciate in this regard that the treatment of a joint venture under the ECMR for the purposes of asserting jurisdiction is distinct from the treatment of the joint venture under Article 101. Nonetheless, this can give rise to the anomalous position described above.

### ***Suggested approach***

- 3.11 We would therefore welcome steps by the Commission to clarify the position, but we have some concerns with the approach suggested by the Commission.
- 3.12 First, the Draft Guidelines, if adopted, will not be binding upon the European Courts or the national courts or regulators. Therefore, any ambiguity in the legal position under the Guidelines may have serious consequences in the context of agreements between competitors.
- 3.13 Secondly, we would question whether these Draft Guidelines are the most appropriate place for the Commission to address this issue, given that the issue could equally arise in respect of non-horizontal agreements.
- 3.14 Thirdly, in any case we do not feel the wording proposed by the Commission goes far enough in explaining the position.
- 3.15 We would propose therefore that the Commission remove or amend the wording extracted above, and consider including more detailed examples of the situations in which a parent company may be considered to have decisive influence over a subsidiary/joint venture for the purposes of the application of Article 101 TFEU.

## **4. ACTIONS ENCOURAGED BY GOVERNMENT AGENCIES**

- 4.1 We are concerned at the narrow approach suggested by the Commission for assessing whether businesses will be exempt from punishment when found to be acting in an anti-competitive manner at the request/wish of a government agency. It appears from paragraph 21 of the Draft Guidelines that businesses will only be exempt from the consequences of infringing competition legislation where national legislation "requires them to engage" in anti-competitive conduct or where government authorities have "imposed irresistible pressures" on them to do so.
- 4.2 If these are the only circumstances in which businesses can participate in a government sponsored initiative in the knowledge that participation will not expose them to a risk of fines, then, in all other circumstances businesses will need to undertake an assessment of what it is they are being asked to do. We question how practicable it will be for businesses to reconcile the tension between co-operation with government schemes and operation of competition law. We question also what is meant by "irresistible pressures".
- 4.3 We are aware of several instances in which businesses have been encouraged by or on behalf of the government to co-operate with competitors and share information with one another only to then have national competition authorities bring actions against them for breach of the competition rules.
- 4.4 If the Commission is to retain this narrow approach, then businesses will be far more reluctant to engage in such government led initiatives for fear of falling foul of the competition rules. Ultimately, what is needed is a greater level of co-operation between government bodies and a more joined up approach when proposing or investigating government led initiatives. We would welcome any steps the Commission is able to take in this regard.

## 5. **INFORMATION EXCHANGE**

- 5.1 We welcome the Commission's detailed guidance on the assessment of information exchange. In particular, we find the analytical framework clear and helpful. We do, however, feel that care needs to be taken to ensure that the framework does not establish a threshold which is too narrow or imposes too onerous a burden on businesses, as this will risk stultifying conduct which is legitimate/pro-competitive. We also have concerns in relation to a couple of specific issues covered by this chapter.

### ***Genuinely Public Information***

- 5.2 We welcome the Commission's clarification that, in general, exchanges of genuinely public information are unlikely to constitute an infringement of Article 101 TFEU. We consider, however, that the definition of "genuinely public information" contained in paragraph 82 of the Draft Guidelines may have an overly restrictive effect.

- 5.3 Paragraph 82 defines “genuinely public information” as information that is “equally easy (i.e. costless) to access for everyone” and states that even where data is in the public domain it is “not genuinely public if the costs involved in collecting the data discourage to a sufficient degree other companies and buyers from doing so”.
- 5.4 We are concerned that this definition raises the threshold as to what may be considered “public information” and has the potential to increase the regulatory burden for businesses that legitimately exchange public information. If businesses are wary as to whether they can exchange information, then this could in fact stop legitimate, pro-competitive, information exchanges.
- 5.5 In addition, Example 6, used by the Commission to highlight what it considers to be genuinely public information, is misleading as it confuses the characteristics of public information with the logistics of collecting such information. To say that prices displayed at petrol stations are not public information because compiling this data would “incur substantial time and transport costs” is confusing and, in our view, incorrect as this kind of information is likely to be available via the Internet (see, e.g. [www.petrolprices.com](http://www.petrolprices.com)). Additionally, it does not provide businesses with clarity on what level of investment is necessary for the information to be considered public/private. This test is of concern as it imposes a mix of subjective/objective approaches. There is a risk that this will impose the Commission’s own view of what will be costly/difficult to undertake and that this may not be on terms with how businesses operate in reality.
- 5.6 We acknowledge that it may be too difficult for the Commission - particularly in guidelines - to set a threshold for what is genuinely public. We would suggest therefore that the Commission consider the inclusion of some more difficult, borderline, examples in order to give clearer guidance as to when information should be regarded as genuinely public and otherwise.

### ***Age of data***

- 5.7 We acknowledge that the age of the data exchanged is one of the factors to be taken into account in determining whether the exchange falls within Article 101 TFEU. We agree with the Commission’s statement in paragraph 86 that “*Whether data is genuinely historic depends on the specific characteristics of the relevant market...*”. We are concerned, however, that the assessment proposed by the Commission is overly cautious.
- 5.8 The Draft Guidelines state that “*data can be considered as historic if it is several times older than the average length of contracts in the industry*”. The Draft Guidelines then refer to Example 5, which concerns an industry characterised by short terms contracts and where prices are re-negotiated every three months. The example concludes that in such an industry, exchange of three year old data

would constitute historic information and its exchange would not be likely to lead to restrictive effects on competition within the meaning of Article 101(1) TFEU.

5.9 We have concerns in relation to this as, whilst this “rule of thumb” may be useful to businesses and in industries with a high level of churn, characterised by short term contracts which are regularly renegotiated, it is less likely to be helpful to those in industries where contracts may be significantly longer. In our experience, contracts in many sectors are negotiated on a less frequent basis than this. As an example, contracts in the energy sector can be for 15 to 20 years or even longer. This could lead to increased regulatory uncertainty for businesses and a risk that businesses are discouraged from participating in lawful, pro-competitive information exchanges.

5.10 We note also the inclusion of footnote 57, in which the Commission states:

*For example, in past cases the Commission has considered the exchange of data which was more than one year old as historic and as not restrictive of competition within the meaning of Article 101(1), whereas information less than one year old has been considered as recent...*

5.11 It is not clear whether this is intended to operate as a further “rule of thumb”. If so, again we would have concerns about this, for the reasons set out above.

5.12 We would suggest that the Commission clarifies that there is no pre-defined age below which data will be considered to be recent and above which it will be considered to be sufficiently historic. We would suggest also that the Commission make clear that the average length of contracts is just one of the factors to be taken into account in determining whether data is recent or historic. In this regard, it would be very helpful if the Commission could provide further examples of the factors to be taken into account.

## 6. **STANDARDISATION AGREEMENTS**

6.1 We welcome the Commission’s detailed consideration of standardisation agreements. However, we do have a few suggestions in respect of this chapter.

6.2 First, it is somewhat confusing for standardisation and standard form wording to be dealt with together, as the two are different in nature and application. We would suggest therefore that standardisation and standard form wording be dealt with separately, perhaps in separate chapters.

6.3 Secondly, it is helpful that the Commission is issuing updated guidance on standardisation, given the recent investigations and case law in the EU and US such as Qualcomm and Rambus. However, recent cases have shown that, where there are concerns surrounding standardisation, these may typically be expected to arise under Article 102 TFEU rather than Article 101 TFEU; for example, where

one party to a standard fails to disclose intellectual property rights (“IPRs”) or in the context of a refusal to supply. We consider therefore that it would be useful to have a complete understanding of how the Commission proposes to treat exclusionary abuses in a standardisation setting. The Commission’s guidance on enforcement priorities in relation to exclusionary abuses<sup>7</sup> does not provide specific guidance on this particular issue.

- 6.4 Thirdly, whilst we agree with the Commission that it is necessary to have a clear IPR policy to prevent users from abusing market dominance, it would be helpful in our view if the Commission were able to give more guidance as to what FRAND terms actually mean in practice. There is obviously some benefit in keeping the concept flexible, but equally it means that there is little, if any, legal certainty as to how the concept would be applied. We consider that it would also be very useful for the Commission to provide more guidance on how royalty levels may be compatible with the FRAND concept. At paragraph 284, for example, the Commission states that it may be possible to compare the *ex ante* licensing fees charged by the undertaking in question for the relevant patents prior to the standard compared with those *ex post* once the industry has been locked in. However, in practice it is often the case that most licensing takes place after the standard has been put in place as it is only then that the relevant claims are granted. It is also the case that the value of a technology may only become apparent subsequently as a result of the standard being implemented. It is important to recognise, therefore, that if a royalty is higher *ex post* then that does not necessarily mean there has been a breach of a FRAND commitment.
- 6.5 Finally, the Commission also includes at paragraph 288 a suggestion that the inclusion of substitute technologies in standardisation agreements would cause foreclosure by excluding competing technology and, as such, would infringe Article 101 TFEU. We consider this to be too wide a presumption.
7. Should the Commission wish to discuss any of the points raised in this submission, we would be happy to assist.

**Eversheds LLP**

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<sup>7</sup> Communication from the Commission - Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02)