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COMMENTS OF *GRIMALDI E ASSOCIATI*

ON THE

**DG COMPETITION REVISED RULES FOR THE ASSESSMENT OF HORIZONTAL
COOPERATION AGREEMENTS UNDER EU COMPETITION LAW**

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I. INTRODUCTION

GRIMALDI E ASSOCIATI welcomes the opportunity to submit its comments to the Directorate General for Competition (“DG Comp”) of the European Commission (the “Commission”) on the Revised rules for the assessment of horizontal cooperation agreements under EU competition law (the “Public Consultation”).

GRIMALDI E ASSOCIATI regularly advises clients on all aspects of EU and national competition law but this response is made on our own behalf, based on our experience of advising clients on these issues.

On these grounds, we particularly appreciate the valuable efforts made by the DG Comp in order to clarify some aspects of the current legal framework and of the rules applicable to cooperation agreements between competing undertakings.

The Public Consultation is particularly remarkable, in our opinion, since it confirms moreover the commitment of DG Comp in strengthening the deep and constructive dialogue with companies and stakeholders, in order to improve those legitimate forms of collaborations between competitors that promote innovation and competitiveness in the European Union business environment.

II. COMMENTS

1. GENERAL REMARK

As it is well known, following the entry into force of Regulation No 1/2003/EC¹, the undertakings are no longer able to take advantage of the prior notification procedure to obtain clarification by the European Commission about arrangements which they are considering entering into.

Horizontal agreements, by their very nature, carry higher potential risks than other types of agreements, because contacts between competitors *per se* generate competition compliance risks which need to be carefully assessed *ex ante* and duly neutralized. Moreover, the Commission’s approach in setting fines generally and in punishing repeat offenders in particular, has become increasingly severe. The combination of the lack of certainty and extremely onerous sanctions means that compared, for example, to the situation with

¹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4 January 2003, p. 1–25.

vertical agreements, clients are much more cautious as regards horizontal agreements, irrespective of the individual benefits of a particular co-operation arrangement.

In our experience, this chilling effect has resulted in the "false positive" of potentially useful, pro-competitive horizontal agreements being abandoned because the parties are not prepared to accept the degree of legal uncertainty which is involved in such transactions. We have seen situations where clients have abandoned potentially efficiency-enhancing horizontal agreements because the restrictive clauses in the agreement were too central to the arrangements to carry the degree of risk of unenforceability which is inevitable in a pure self-assessment system with no possibility of comfort from the competition authority.

In this context we particularly appreciate the proposal concerning the Guidelines under consultation (the "Draft Guidelines") which will introduce two main changes to the current applicable rules on horizontal cooperation agreements: namely (i) the introduction of a new chapter on information exchange; and (ii) a substantial revision of the standardisation chapter.

The above mentioned additional guidance on matters such as information exchanges, the explicitly economics-based explanation and the examples proposed by the Guidelines will constitute a valuable tool which will help the undertakings in the assessment of the agreements they plan to enter into.

However, we regret that the Commission has not provided in the Draft Guidelines further guidance on the scope of application of the Block Exemption Regulations on horizontal agreements² (hereinafter also the BERs), and we suggest that in the final version of the Guidelines such issues will be discussed more extensively like has been done by the Commission in the Vertical Guidelines³ with respect to the Block Exemption on vertical agreements⁴.

A clarification of the scope of the Block Exemption Regulations on horizontal agreements would indeed be beneficial for market operators as such Regulations are not always clear and in practice there is often uncertainty whether a BER would apply to a specific agreement.

² Draft R&D Block Exemption Regulation and draft Specialisation Block Exemption Regulation (available at: http://ec.europa.eu/competition/consultations/2010_horizontals/index.html).

³ Guidelines on Vertical Restraints, Official Journal C 130, 19 May 2010, p. 1.

⁴ Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, Official Journal L 102, 23 April 2010, p.1-7.

2. The Commission policy towards horizontal cooperation

In light of the draft content of the proposed Draft Guidelines, the Commission seems oriented towards a more economic-based approach since it clarifies that each case has to be analysed in its economic context, taking into account of the nature of the agreement, the parties combined market power and some structural factors. The Guidelines focus on six broad categories of cooperation between competitors, actual or potential, which are types of cooperation that could generate efficiency gains. In fact, horizontal cooperation agreements can permit substantial economic benefits where competitors share risk, save costs, increase investments, pool know-how, launch innovation faster.

3. R&D Arrangements

One of the sectors where cooperation agreements can take place is research and development, in particular in the research-based or technology driven markets, such as pharmaceutical, medical equipment, biotechnological industries. In these sectors, in order to analyze competition in innovation process and in order to predict the future effects, the conditions for innovation must be reasonably transparent and foreseeable.

It is known that in markets where innovation takes frequent and unpredictable turns, R&D aspects may influence the regular product market assessment but have little stand alone value. In this kind of markets, innovation is a phenomenon that tends to make public intervention superfluous, since it is difficult, even for a current monopolist, to exercise any power over current innovation. Moreover, with regard to this kind of markets, “characterized by an high level of innovation, other structural phenomena and entry barriers, such as network effects, industry standards and key technologies can create competition structure relating to innovation which is more predictable and thus more conducive both to strategic action by market participants and to antitrust analysis”⁵.

Therefore, we appreciate the fact that the Commission has a positive approach towards the R&D agreements and has tried to clarify the joint exploitation of the collaboration, in particular with regard to innovative products that create innovative markets. Many undertakings could not be interested in developing new products if they could incur in competitive concerns for the exploitation of the products or at moment of the commercialisation. In fact, it must be taken into consideration that the future use of the results of the research is, in many cases, an essential aspect that moves the companies towards starting the research. Sometimes, in fact, small research companies enter into agreements with big industries that are interested into the exploitation of the results in

⁵ See Marcus Glader, *Innovation Market and Competition Analysis*, Edward Elgar Publishing 2006, p. 92.

exchange of investments in the research, and for the small research-based companies this is the best way to obtaining financings for their R&D.

The case by case and more economic-oriented approach adopted by the Commission could lead to focus on the objective benefits gained by means of the agreement in question, depriving such analysis of any possible preconceived assumptions.

In this contest, however, Grimaldi e Associati would suggest that, in order to ensure a certain degree of legal certainty, the Commission clarifies the conditions for the exemption of joint research agreements and in particular the scope of the access condition set at Article 3(3) of the Draft R&D Block exemption with respect to issues such as the freedom of the parties to a research and development agreement to set remuneration for access to their IP rights.

4. Production agreements

According to the Draft Guidelines, the production agreements⁶ could raise some concerns since they may lead the parties to agree directly on output levels and quality, on the price at which the joint venture sells its products or on other competitive parameters.

Therefore, these kinds of agreements do not restrict competition if they incur between non competitors, except in case of foreclosure. As well, an agreement between competitors will normally not restrict competition under Article 101 of TFUE if the agreement does not result in a high degree of “cost-commonality”.

The Draft Guidelines recognize that the production agreements can be pro-competitive if they provide efficiency gains in the form of costs savings or better production technologies. By joint production systems the companies can save costs that otherwise would duplicate. In case the agreement raises some concerns, it is possible to operate an evaluation under the criteria laid down according to Article 101, para. 3 of TFUE, but its assessment is still difficult and creates some uncertainty for the companies.

We welcome the efforts made by the Commission that has provided some examples of production agreements that could have potential negative effects, but unfortunately in our perception the principles laid down by the Guidelines may remain often difficult to apply in practice.

⁶ According to the Draft Horizontal Guidelines production agreements are those agreements where the production is carried out by only one party or by two or more parties in the form of joint venture or subcontracting agreements where one party entrust to another party the production of a good (par. 144).

In addition, we believe that the Draft Guidelines should provide further guidance with respect to the reciprocal specialisation agreements exempted under the Draft Specialisation Block Exemption Regulation (art. 2).

The Regulation states that are exempted “reciprocal specialisation agreement between two or more parties which are active on the same product market(s), by virtue of which one party agrees to fully or partly cease production of certain products or to refrain from producing certain but different products and to purchase products from the other parties, who agree to produce and supply them”.

However neither the Draft Specialisation Block Exemption Regulation nor the Draft Guidelines define the notion of different product.

5. Standardisation agreements

Standardisation has a relevant place in technological based-industries and also in some sectors such as banking. As recognized by the Draft Guidelines, standardisation agreements generally have positive economic effects, increasing competition and lowering output and sales costs. Standards may maintain and enhance quality, provide information and ensure interoperability.

On the other hand, standard setting can create restrictive effects on competition by way of foreclosure, or in the form of limitation of innovation in the process of selecting the technologies in the market. In particular, a company holding an essential intellectual property right relating to a standard could control its use and thereby the product or service market to which the standard relates.

The need for common standards is underlined by the increasing globalisation of trade and the convergence of technologies. While standardisation will remain a market-driven and self funded activity, there is public interest in the maintenance of a standardisation infrastructure that is open and impartial, and that operates in a transparent way. The acceptability of standards depends to a large extent on the involvement of all the parties concerned. Stakeholders’ participation in the standardisation process has a strong accountability dimension. It reinforces the quality of the consensus and makes the standards more representative. The Draft Guidelines have clarified that, where participation in standard setting is unrestricted and transparent, standardisation agreements could have positive effects.

The standardisation could create some concerns in particular when a standard includes a patent technology. In this direction, the Draft Guidelines have introduced the access for all

third parties to the standard on “fair, reasonable and non-discriminatory” (FRAND) terms. The Draft Guidelines and the FRAND commitments aim at guaranteeing that patent technology incorporated in a standard is accessible to the users of that standard on fair, reasonable and non discriminatory terms and conditions.

Those questions are particularly sensitive since the standards that involve IPRs are the results of investments and research and those investments have clearly to be protected and remunerated. Moreover, the Draft Guidelines provide some methods for assessing the value of IPRs patents and the price at which the standards should be disclosed. With regard to this aspect, we would like to point out that the value of an IPR and of a standard could change from time to time according the development of its use. The owner of the IPR should be allowed to change the licensing fees according to the quality and the importance of the IPR in the standard system. If the competitors’ interests to have access to the IPR or the standard to a reasonable and competitive price are to be taken into consideration, the owner’s interest to protect its patent and to be remunerated for its investments must be considered as well under a fair balance.

III. CONCLUSION

GRIMALDI E ASSOCIATI thanks the Commission for having opened this consultation process to discuss these important topics and welcomes the proposed adoption of new Horizontal Guidelines, and of a new R&D Block Exemption Regulation and Specialisation Block Exemption Regulation. Upon the entry into force of Regulation No 1/2003/EC, in fact, the business operators find in the Commission clarifications a veritable “compass” to direct their economic actions and commercial decision on the market in full compliance with the EU competition principles.

From the outset, the case by case and more economic approach seems the appropriate way to ensure that each agreement receives its proper assessment in the real economic environment in which it is conceived and subsequently performed. Nonetheless, it seems undeniable that a sound economic analysis may result in a challenging and somewhat difficult experience for the undertakings concerned. On this respect, the introduction in the final version of the Horizontal Guidelines of more detailed examples and parameters would be truly appreciated since it may contribute in the achievement of the desired legal certainty, that is indeed a common and pivotal goal within the European Union innovation process.

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