

**RECOMMENDATIONS OF HOGAN LOVELLS INTERNATIONAL LLP ON THE EUROPEAN COMMISSION'S
REVISED RULES FOR THE ASSESSMENT OF HORIZONTAL COOPERATION AGREEMENTS**

1. INTRODUCTION

Hogan Lovells is an international law firm which regularly advises clients on different types of horizontal cooperation in various industries. We welcome the opportunity to contribute to the public consultation on the revision of the guidelines.

In this submission we would like to comment specifically on part of paragraph 11 of the Commission's draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements (the "**Draft Guidelines**") published on 4 May 2010, which we consider needs clarification, as the present wording may be interpreted as being contrary to the Commission's prior decisional practice.

Paragraph 11 of the Draft Guidelines provides, "*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. Article 101 could, however, apply to agreements between the parents outside the scope of the joint venture and with regard to the agreement between the parents to create the joint venture.*"

This wording appears confusing in particular as regards the following points:

- the distinction between full-function and cooperative joint ventures;
- the concept of an undertaking and group of undertakings; and
- the assessment of the relations between a joint venture and its parents.

We consider that this statement may be interpreted as going further than the Commission and the European Courts' existing jurisprudence in these areas, thereby resulting in Article 101 TFEU no longer being applicable to anti-competitive practices between a parent and its joint venture.

2. DISTINCTION BETWEEN FULL-FUNCTION AND COOPERATIVE JOINT VENTURES

Paragraph 11 does not specify whether the statements are to apply equally to full-function and non full-function or cooperative joint ventures.

The Commission's intention may be that this part of paragraph 11 of the Draft Guidelines should apply to cooperative joint ventures only, given that paragraph 6 provides, "*These guidelines apply to the most common types of horizontal co-operation agreement irrespective of the level of integration they entail with the exception of operations constituting a concentration within the meaning of Article 3 of the Merger Regulation as would be the case, e.g., for full-function joint ventures.*"

Indeed, the establishment of a cooperative joint venture is subject to self-assessment by the parties/parents to that cooperation agreement under Article 101 TFEU, having regard to the horizontal cooperation guidelines as appropriate.

However, even if the statement were to relate only to cooperative joint ventures, the reference to the "joint exercise of decisive influence and effective control" without further explanation is misleading, as this phraseology could cover both "full-function joint ventures" under the EU Merger Regulation ("**EUMR**")¹ and "a single economic unit" for the purposes of applying Article 101(1).

Moreover, the last sentence, which provides that Article 101 can apply to the agreement between the parents to create the joint venture, could be read as including a reference to the assessment of ancillary restraints. Again, a distinction should be made here between full-function and non full-function joint ventures.

For cooperative or non full-function joint ventures where there is no merger control review, assessment of the entire agreement is made with reference to Article 101 TFEU.

Under the EUMR, the Commission assesses whether the establishment of a new full-function joint venture will cause any significant impediment to effective competition or result in the coordination of the competitive behaviour of independent undertakings. Ancillary restraints on competition that are directly related to and necessary for the implementation of the concentration are deemed to be covered by the decision declaring the concentration to be compatible with the EU internal market². However, the Commission Notice on restrictions directly related and necessary to concentrations provides that Articles 101 and 102 TFEU remain applicable to all restrictions of competition that cannot be regarded as directly related and necessary to the implementation of the concentration³.

It seems therefore that the principles contained in paragraph 11 cannot apply either exclusively to cooperative joint ventures or to full-function joint ventures, or even to both, and that clarification is therefore needed on the scope of this paragraph.

The need for this clarification is further illustrated by the apparent contradictions in the first part of the extract of paragraph 11 set out above.

3. **CONCEPT OF AN UNDERTAKING AND GROUP OF UNDERTAKINGS**

Paragraph 11 provides that a jointly controlled joint venture forms one undertaking together with each of the parents that exercise decisive influence over it. This broad statement appears to contradict fundamental principles of EU competition law.

First, a cooperative joint venture may not actually be an independent undertaking at all, but merely a form of co-operation between its parents, who will normally be two independent undertakings.

Secondly, a full-function joint venture should be treated as an independent undertaking. This is implicit in the concept and definition of a full-function joint venture, since it performs on a lasting basis all the functions of an autonomous economic entity⁴.

We consider that an autonomous (full-function) joint venture, even if jointly controlled by its parents, cannot be part of two different undertakings within the meaning of Article 101 at the same time. Assuming they have not merged with each other, two independent parent companies cannot as a result of the creation of the joint venture form part of one undertaking with each other and the joint venture.

¹ Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L24, 29.1.2004, p 1.

² Article 6(1)(b) and Article 8(1) of the ECMR.

³ OJ C56, 5.3.2005, p. 24, at paragraph 7.

⁴ Article 3(4) of the ECMR, and the Commission Consolidated Jurisdictional Notice, OJ C95, 16.4.2008. p. 1, paragraphs 91-109.

Moreover, although each parent company may be able to control the joint venture effectively via the exercise of strategic veto rights (according to the interpretation of control for EUMR purposes), they may not be able to control the joint venture's commercial activities and/or marketing policy sufficiently to remove its status as an autonomous actor on the market. In fact, joint control may indicate that no single parent company is in a position separately to exercise decisive influence over the commercial activities of the joint venture⁵. The independent parent companies must agree in order to adopt and implement a common commercial policy and in case of disagreement the only option may be to block the operation of the joint venture entirely.

The Draft Guidelines refer to the *Avebe* case as support for the statement that a joint venture forms part of one undertaking with each of the parent companies that jointly exercise decisive influence and effective control over it. The question arose in this case whether parties collaborating in a joint venture, which did not have legal personality, could be held liable for an infringement of Article 101 TFEU committed by the joint venture⁶.

This case does not seem specifically relevant, as it involved rather particular facts and did not deal with the issue of whether parent-joint venture coordination was outside the scope of Article 101 TFEU, which is the issue addressed in paragraph 11.

4. RELATIONS BETWEEN PARENT COMPANIES AND A JOINT VENTURE

The Draft Guidelines provide that Article 101 TFEU should not apply to agreements between a joint venture and the parent companies which exercise decisive influence and effective control over the joint venture. This statement cannot be true of the relations between full-function joint ventures and their respective parents.

As mentioned above, the wording of paragraph 11 gives rise to a confusion between the notion of control under the EUMR and the interpretation of the single economic entity doctrine under Article 101 TFEU, whereas these have been distinct concepts with different consequences in terms of the application of Article 101 TFEU.

Control for the purposes of the EUMR (exercise of strategic veto rights) does not automatically mean that Article 101(1) TFEU should not apply to the relations between the parent company and that subsidiary, where the subsidiary is an autonomous economic entity. On the contrary, in line with the Commission's own decisional practice, if the joint venture is full-function, and therefore an autonomous undertaking, as explained above, we consider that Article 101 TFEU should apply to relations between the joint venture and its parents just as it applies to two or more independent undertakings.

The Commission has previously expressly rejected arguments claiming that a jointly-controlled full-function joint venture formed one undertaking with its independent parent companies with the aim of precluding the application of Article 101 TFEU to relations between the joint venture and its parents.

4.1 *IJsselcentrale*

In the *IJsselcentrale*⁷ case the Commission examined the relations between four joint shareholders of a joint venture and the joint venture itself as evidenced by a joint venture agreement and a subsequent cooperation agreement. The Commission decided that the four shareholders did not belong to a single group of companies as they were separate legal persons not controlled by a single person, legal or natural. Moreover, the

⁵ Commission decision of 14 September 1999 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case IV/36.213/F2 — GEAE/P & W), OJ L58, 3.3.2000, p.16, at paragraphs 66-68.

⁶ Case T-314/01, *Avebe* [2006] ECR 3085, at paragraph 141.

⁷ Commission Decision of 16 January 1991 relating to a proceeding under Article 85 of the EEC Treaty (IV/32.732 - *IJsselcentrale and others*) OJ [1991] L 28 2.2.1991, p.32.

Commission found that the joint venture did not itself form an economic unit with one or more of its shareholders; rather it was a joint venture controlled by its parent companies together. Therefore, Article 101 TFEU did apply to the agreements between the joint venture and its parent companies.

The Commission stated that, "*It is true that Article [101] is not concerned with agreements between undertakings belonging to the same group of companies, and having the status of parent company and subsidiary, if the undertaking forms an economic unit within which the subsidiary has no real freedom to determine its course of action on the market, and if the agreements are concerned merely with the internal allocation of tasks as between the undertakings (Court of Justice, Case 30/87 Bodson); but that is not the situation here*"⁸.

We therefore conclude that the statement in paragraph 11 of the Draft Guidelines, according to which Article 101 does not apply to agreements between the parents and such a joint venture, can only be true with regard to cooperative non full-function joint ventures.

4.2 **Gosme/Martell - DMP**

In this case, the Commission found that a joint venture and one of its parent companies were independent undertakings within the meaning of Article 101 TFEU, allowing the Commission to conclude that the parent company and the joint venture had *inter alia* colluded to prevent parallel trade. Separate fines were imposed on the relevant parent company and on the joint venture.

The factors that the Commission took into account in concluding that the joint venture was an independent undertaking, also classically used to point to the existence of a full-function joint venture, showed that the parent company was not in a position to control the commercial activity of the joint venture because:

- the parent companies each held 50% of the capital and voting rights of the joint venture;
- half the supervisory board members represented one shareholder and half the other shareholder;
- the joint venture also had customers that were not its parent companies; and
- the joint venture had its own sales force and concluded agreements with its customers on its own terms.

This case illustrates the proper application of the principles of a single economic unit, the concept of an undertaking, and control of coordination between parent companies and a joint venture.

It therefore appears that the general principles in paragraph 11 of the Draft Guidelines are at odds with these prior decisions of the Commission if applied to full-function joint ventures.

5. **POTENTIAL ADVERSE EFFECTS OF CURRENT WORDING**

As a result of the points outlined above, our primary concern is that the drafting of paragraph 11 of the Draft Guidelines will cause companies to revisit their relationships with their jointly controlled full-function joint ventures, which could result in a violation of Article 101 TFEU.

⁸ Ibid, at paragraphs 23 and 24.
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We consider that the current wording of the Draft Guidelines may give rise to *inter alia* two specific problems in practice as a result of the lack of clarity it brings into relations between parent companies and their joint ventures:

5.1 Ability to impose/include anticompetitive restrictions on a JV

Notably, the Draft Guidelines would appear to permit parent companies to conclude anti-competitive agreements with their joint ventures, which could include agreements to prevent parallel trade, partition markets and/or fix prices to the detriment of other independent undertakings and/or to the detriment of another parent company.

For example, following the interpretation provided by the Draft Guidelines, a parent company would be able to impose resale price maintenance, territorial restrictions and exclusivity clauses on its full-function joint venture, since paragraph 11 states that Article 101 TFEU should not apply to such relations (only to the relations between the parents and to the creation of the joint venture).

5.2 Information exchange

We consider that, where a full-function joint venture is subject to joint control and is active in the same market as one or more of its parent companies, commercially sensitive and confidential information regarding their activities in that market should not be shared between the parent company(ies) and the joint venture: in this scenario, the joint venture is a competitor of the parent company(ies) and the normal rules on information exchange between competitors should apply.

However, according to our understanding of the Draft Guidelines as presently drafted, Article 101 should not apply to agreements between jointly controlled full function joint ventures and their parent companies.

In a situation where the jointly controlling parent companies are active in the same market as the full function joint venture and/or each other, paragraph 11 would appear to pose a high risk of coordination resulting from the exchange of all commercially sensitive and confidential information.

6. CONCLUSION ON RECOMMENDATIONS

We consider that the inclusion of this paragraph in the Draft Guidelines, especially as it is currently drafted, adds confusion to an area which has not been the subject of particular legal difficulty or uncertainty to date. Therefore, additional guidance is not as such necessary and we deem it preferable to remove this section of the paragraph altogether.

Alternatively, we would appreciate the Commission's clarification on (i) the type of joint venture that the Commission intends to be covered by the statements in paragraph 11, (ii) the concept of a group of undertakings as it relates to joint ventures and (iii) the quality of control/decisive influence required in order for Article 101 TFEU to be disapplied to relations between a jointly controlled full-function joint venture and its independent parent companies.
