

Linklaters

Comments of Linklaters LLP

on the European Commission's draft Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements.

1 Introduction

This paper is submitted by Linklaters LLP in response to the European Commission's consultation on a new set of draft guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union ("TFEU") to horizontal co-operation agreements (the "Guidelines" or "draft Guidelines").

It makes some general comments on the analytical framework that underpins the Guidelines (Section 2) and then addresses more specifically the following points:

- The language in para. 11 on the undertaking concept, in particular with regard to joint ventures (Section 3);
- Information exchange (Section 4);
- Research and development agreements (Section 5);
- Purchasing agreements (Section 6); and
- Standardisation agreements (Section 7).

2 General comments on the analytical framework

The draft Guidelines are useful in that they cover areas in which there has previously been significant uncertainty. They generally provide valuable insight into the Commission's approach to the effects-based analysis which will determine the assessment of many agreements in practice. Nevertheless, concerns remain in certain areas:

2.1 Object versus effect. Many sections in the Guidelines begin with the statement that the economic analysis set forth in the respective section is not relevant for restrictions by object, and refer to the Commission's general guidelines on the application of Article [101](3) in this respect (footnotes 17 and 26 of the Guidelines). The distinction between restrictions by object (which restrict competition by their very nature and cannot typically be justified) and restrictions by effect (for which the guidelines provide an analytical framework) therefore plays a crucial role. Nevertheless, a significant degree of uncertainty surrounds the question whether a restriction of competition is one by object or one by effect.

It would also be useful to develop the discussions in the draft Guidelines more specifically with regard to all types of cooperation covered in the draft Guidelines and not only with regard to information exchanges (paras. 67 and 68 of the Guidelines, see also Section 4.1 below).

2.2 Market entry (para. 10). The Guidelines consider that an undertaking is a "potential competitor" if it is likely that market entry would occur as a result of a small but permanent price increase "within a short period of time" (para. 10). This period is inconsistently defined in the Commission's guidelines on vertical restraints (one year in para. 27) and in the new draft regulation on research and development agreements (three years, Article 1(16)). If this difference is intentional, the reasons should be spelt out in order to avoid a negative effect on legal certainty. Otherwise, the time frame should be aligned to the guidelines on vertical restraints that are already in force.

2.3 "The most upstream indispensable building block" (para. 13). The rationale behind the focus on the most upstream indispensable building block is unclear and

we would question whether this starting point for the analysis is appropriate in all cases and, in particular, where the most upstream indispensable building block is outside the economic centre of gravity of a cooperation agreement. This is of particular concern with regard to the last sentence, since the concept might lead to the exclusive application of safe harbours that are not inspired by the agreement's main economic objectives and restrictions.

2.4 Market power (para. 26). The draft Guidelines refer to the concept of market power in several sections. Para. 37 defines it as *“the ability to profitably maintain prices above competitive levels for a period of time or to profitably maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a period of time”*. Para. 40 specifies that market power is a question of degree and the relevant threshold in this context is lower than the threshold for a dominant position within the meaning of Article 102 TFEU. If market power is a question of degree, the Guidelines should provide for a safe harbour by reference to a market share threshold or to the de minimis notice.

2.5 Use of examples. The Commission's approach to include further examples in the draft Guidelines is a positive development. However, too many of the examples concern clearly admissible or clearly inadmissible conduct. Those examples make the draft Guidelines more difficult to digest without facilitating the analysis of specific forms of cooperation. We would therefore welcome a stronger focus on examples that are borderline and can contribute in a meaningful way to providing more legal certainty. We will return to this comment in some of the sections below, but make the point here because it applies to many forms of cooperation discussed in the draft Guidelines.

2.6 Counterfactual. The draft Guidelines provide that co-operation agreements between competitors that would not be able to independently carry out the project or activity covered by the cooperation will normally not restrict competition. This clarification is useful as the situation is one that arises frequently in practice. In particular, some national competition authorities have developed an approach to, for example, consortia that compete for projects that their members could not complete individually. Because of the practical significance of such situations, we would welcome further guidance, especially on the assessment of whether or not a company is able to complete a project individually. Very often, the relevant question is not one of technical feasibility, which is straightforward to assess. More difficult are situations in which an individual offer is not made because of risks that need to be spread, costs that are too high without relying on synergies that arise from the cooperation or access to financing that becomes easier in a consortium. It should therefore be specified that a company is not able to independently carry out a project where its overall costs would be higher than the expected market price and where the cooperation aims to generate synergies that enable the company to be competitive.

3 Undertaking concept

Para. 11 of the draft Guidelines provides 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 Guidelines cite the General Court's judgment in *Avebe*¹ in support of this proposition. It then concludes that Article 101 TFEU does not apply to agreements between the parents and such a joint venture, provided that the creation of the joint venture did not infringe EU competition law.

3.1 Policy perspective. We agree from a *policy perspective* that, all other factors being equal, agreements between parents and a joint venture are less likely to raise competition concerns than agreements between independent companies that are not structurally linked. As a shareholder, the parent will have to assume its share in the joint venture's financial performance and contribute to its success. This will weaken any incentive to compete with the joint venture. Similarly, the joint venture has an interest in having shareholders that support it by providing financing and assets. It will know that, if it competes aggressively with its own parents, this might limit their willingness to support it.

3.2 Inconsistency with the undertaking concept as applied so far. EC competition law has taken this into account for many years. For example, the Commission's practice on ancillary restraints recognises that competition between a joint venture and its parents can be restricted. And competition authorities rarely take issue with agreements between joint ventures and their jointly controlling parents in practice. However, this practice is clearly based on the assumption that Article 101 TFEU *applies* to the relationship between a joint venture and its jointly controlling parents. The statement in para. 11 is also inconsistent with the Commission's decisional practice. For example, in *Rubber Chemicals*, the Commission looked at a jointly controlled joint venture and concluded that:

"In the case of a joint venture, jointly owned by its parents (and over which none of the parents had de facto or de iure sole control) the joint venture can be presumed to be autonomous from its parent companies".²

This decision states the exact opposite to para. 11 of the draft Guidelines without any explanation as to the reason for this proposed u-turn. The contradiction with the Commission's practice is bound to lead to confusion, at least until the Commission explains in some detail why it intends to depart from the *Rubber Chemicals* presumption.

The ECJ has held that "the term 'undertaking' is aimed at economic units which consist of a unitary organisation of personal, tangible and intangible elements".³ At least where a joint venture has its own management, resources, market access and staff, this supports the *Rubber Chemicals* presumption and is not in line with treating a joint venture and its jointly controlling parent(s) as one and the same undertaking.

3.3 Avebe does not support the statement in para. 11. The Commission relies on only one case – *Avebe* – to lend support to its position that a joint venture forms one and the same undertaking with its parents where they jointly exercise decisive influence over it.

¹ Case T-314/01 *Coöperatieve Verkoop- en Productievereniging van Aardappelmeel en Derivaten Avebe BA (Avebe) v Commission* [2006] ECR II-3085.

² COMP/F/38.443, *Rubber Chemicals*, Commission Decision of 21 December 2005, OJ 2006 L 353/50, para. 263.

³ Case T-11/89 *Shell v Commission* [1992] ECR II-757, para. 311.

However, the outcome in *Avebe* was highly specific to its facts. The “joint venture” in that case was a purely contractual entity without distinct legal personality. On this basis, the General Court allowed the Commission effectively to “look through” the joint venture. This is obviously quite a different situation to a scenario involving a separate legal and economic entity.

- 3.4 Para. 11 is confusingly drafted.** The provision concerns “parent companies that jointly exercise decisive influence and effective control over” a joint venture (emphasis added). This wording is confusing in that it does not spell out the relationship between “decisive influence” and “effective control”.

In the context of parent liability for subsidiaries, the European Courts have defined decisive influence as a situation in which a subsidiary “*carries out, in all material respects, the instructions given to it by the parent company*”.⁴ The ECJ’s recent *Akzo* judgment refers approvingly to the opinion of Advocate General Kokott’s opinion. The Advocate General equates *decisive influence* to a situation in which the parent company is “pulling the strings” that determine the subsidiary’s conduct. It seems thus obvious that passive veto rights alone do not give rise to decisive influence. In the typical jointly controlled joint venture, however, none of the parents has positive control in the sense that they could determine the subsidiary’s conduct alone.

While “control” is a fundamental and well-defined concept of competition law, it is entirely unclear what the Commission means by “effective control” in para. 11 of the draft Guidelines. If this wording is meant to indicate that passive veto rights are insufficient (which it should), the sentence on joint ventures is redundant. Situations of “positive control” or “sole control” are already covered by the first part of para. 11, and there is no such thing as “joint decisive influence”.

- 3.5 The last sentence of para. 11 is incompatible with Article 3(4) EUMR.** The draft Guidelines suggest that “Article 101 could [...] apply [...] the agreement between the parents to create the joint venture”. This seems to effectively reverse the analytical framework for joint ventures as set out under the merger regulation. Under the EUMR, the *creation* of a full-function joint venture is assessed as a concentration under the merger control rules and not under Article 101 TFEU (Article 3(4) EUMR). Ancillary restraints, i.e. agreements that govern the market conduct of the joint venture and its parents post-creation, are governed by Article 101 TFEU and covered by the clearance decision only if specific conditions are met (Article 8(1.2) EUMR). Para. 11 of the draft Guidelines seems to turn this around. The creation of the joint venture would become subject to Article 101 TFEU, whereas all the behavioural restraints between the joint venture and its parents would be outside the scope of competition law without any further conditions. This can only create confusion, especially because the Guidelines cannot modify the EUMR.

- 3.6 The Guidelines should not try to anticipate imminent rulings of the General Court.** Given that a number of Commission decisions treating a joint venture as part

³ Case 48/69 *ICI v Commission* [1972] ECR 619, para. 133 (emphasis added). See also Case 107/82 *AEG v Commission* [1983] ECR 3151, para. 49; Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C 213/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR I-5425, para. 117; Case T-314/01 *Avebe* [2006] ECR II-3085, para. 135. Very often the test is abbreviated and the question asked is whether or not the alleged parent has the ability to, and has in fact exercised, *decisive influence* (indeed even in *ICI v Commission*, the Court expressed itself in this way in finding that the parent had decisive influence and had exercised that decisive influence). The shorthand version illustrates the underlying test, rather than replaces it. One of the key requirements therefore remains that the subsidiary carried out “*in all material respects, the instructions given to it by the parent company*”.

of one undertaking with its parents are pending appeal before the General Court,⁵ the Commission should avoid using these Guidelines as a vehicle to pre-empt the Court's findings. For these reasons, we would suggest that the language on joint ventures be removed at this stage from para. 11.

4 Information exchange

The section on information exchanges is a welcome consolidation of existing texts and case law. It draws a line between exchanges that will for practical purposes be considered *per se* violations of Article 101 TFEU, and exchanges that will be analysed on their effects (paras. 67, 68 of the Guidelines). However, the text supplements existing guidelines for information exchanges in the maritime sector⁶. A consistent and uniform framework for the assessment of information exchanges might be preferable, in particular, since the text on maritime transport is not inspired by practice that is specific to this industry. The Commission might therefore wish to make clear that the framework set out in the Guidelines also applies in the maritime sector and supersedes the language in these sector-specific guidelines.

4.1 Violations by object and by effect (paras. 69 and 70). An information exchange should be treated as a restriction by object where its only plausible objective is to restrict competition and where it can be ruled out as serving any other purpose. This implies an analysis of the effects that the exchange could plausibly be designed to have. Where such plausible effects occur beyond the restriction of competition, they should be assessed in order to conclude whether or not an information exchange infringes Article 101(1).

This principle seems simple, but paras. 69 and 70 apply it confusingly to information exchanges. The confusion arises at two different levels. First, the Guidelines do not recognise that the object of an information exchange cannot typically be established without taking potential effects into account. The ECJ has made clear that a violation by object cannot be established in circumstances in which a practice does not have the potential to restrict competition.⁷ Second, the Guidelines do not make clear that even restrictions by object can have pro-competitive effects that must be assessed and balanced against the restrictions in the framework of Article 101(3) TFEU. Para. 93 of the draft Guidelines recognise this for exchanges of future prices, but it should be made clear that the statement is of more general relevance.

The only information exchange that the Commission treats unambiguously as a restriction by object is the exchange of future prices. The Commission rightly emphasises that such an exchange is "particularly likely to lead to a collusive outcome" although, whether or not plausible pro-competitive reasons prevail for such an exchange will have to be assessed on a case-by-case basis. If such reasons exist, the effects will have to be analysed. That such reasons are "less likely" is correct, but cannot be a basis to ignore them in cases in which they may exist.

⁵ Commission decisions such as COMP/F/38899 *Gas Insulated Switchgear*, COMP/39165 *Flat Glass*; and COMP/39188 *Bananas*.

⁶ 2008/C 245/02, Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, section 3.2.

⁷ Case C-8/08, *T-Mobile Netherlands* [2009] ECR I, para. 31.

The second and third sentences of para. 68 give rise to further confusion. Almost any exchange of current data will provide some insight into likely future market conduct. It is, in our view, inappropriate to assess and balance these effects without a solid analysis, simply by declaring that they should be treated as restrictions by object.

- 4.2 Reference to cartels.** Para. 9 of the draft Guidelines states that it will not give guidance on what does and does not constitute a cartel. According to para. 59, restrictions that are found to have the “object of fixing prices or sharing markets or customers ... run the risk of ... ultimately being fined as cartels”. This involves a risk of very significant sanctions and is a further reason to define the concept of object restrictions narrowly. An information exchange should not be treated as a violation by object where it cannot entirely be ruled out at the outset that it might have pro-competitive effects. This should be made clearer in para. 59.
- 4.3 Safe harbour for information exchanges?** There are a number of typical scenarios in which undertakings exchange information for reasons that are obviously pro-competitive. Nevertheless, broad language about object restrictions in several recent cases has created a significant level of uncertainty in this area. Examples include: (i) due diligence in the framework of M&A; (ii) benchmarking within trade associations; or (iii) exchanges for lobbying purposes. It would be helpful if the Guidelines set out general principles that would steer companies that design such exchanges. In particular, the Commission should make clear what value it attributes to measures that are designed to reduce any restrictive effect such as: (i) by involving third parties; (ii) information barriers that prevent a flow to operative units within an undertaking; and (iii) by involving a number of companies that are large enough to avoid aggregated data being easily disaggregated by recipients.
- 4.4 Exchanges of “public” information.** Para. 84 sets out that information is “genuinely public” only if the exchanged information is “equally” accessible to all competitors and buyers. It should be made clear that this condition is met where every market player can obtain the information without *significant* additional cost or delay. Companies often contribute their data to databases that are then made available by independent commercial operators at a cost. Information that is available from such databases should be treated as public even though companies that do not contribute will have to pay a higher cost, at least to the extent that the additional cost is not so high that it effectively deters operators from purchasing the information.
- 4.5 Examples.** It is somewhat unfortunate that all the examples on information exchange concern cases that are straightforward in terms of the result of the analysis. These are not the types of cases in which legal uncertainty arises and which trigger the need for guidance. Further, the Commission does not explain at all why a specific restriction is treated as one by object or one by effect. This may be so because the examples are so clear that it would make no difference which way they were treated, but given the uncertainty about the precise line between both concepts and the importance that this line has in more borderline cases, the examples should be used to provide further insight into the Commission’s methodology on this point.

5 Research and development agreements

It does not seem justified to require that R&D agreements have to ensure equal access to the results of R&D. It is sometimes economically viable and beneficial for all concerned to provide unequal input and effort, which in turn is also an objective reason to provide unequal access to output.

6 Purchasing agreements

The clarifications with regard to purchasing agreements are helpful. Our only comment relates to the impact on downstream retail markets. Buying alliances in the retail sector are often created by companies that do not, or do not significantly compete on downstream markets. However, these markets are often defined narrowly from a geographic standpoint. This may lead to a situation in which two companies that are active in different countries fall outside the safe harbour only because they compete on one small regional market. This is because some local customers could cross the border or because supply logistics are set up in a way that makes it attractive for one of the companies to have an outlet across the border. It should be clarified in para. 194 that downstream markets will only be assessed if there is a “significant” overlap between the parties on downstream markets. Such an overlap should be treated as insignificant where, for example, it concerns only less than 5% of the goods or services that are purchased jointly.

7 Standardisation agreements

7.1 Absence of Court precedents. While guidance on the assessment of standardisation agreements is a welcome addition in the draft Guidelines, they will have to take into account the limited experience and case law from which the Commission can draw. The approach in this area therefore has to be more cautious than in others and where the Guidelines set out obligations for companies, these should be solidly rooted in established competition law principles. In some areas, we would welcome a more cautious and flexible approach. More specifically, these include:

- An obligation to disclose IPRs (para. 281) should be limited to companies that actively participate in a process and aim to influence it in a way that increases the likelihood that their rights will become relevant for the standard (“active misrepresentation”). This would also avoid a situation in which companies would be forced to infringe patent regulations that, at least in some countries, contain an obligation to treat pending applications as confidential.
- Rather than requiring a FRAND commitment (paras. 277 and 282), the conditions for access to the intellectual property should be negotiated at the time at which the standard is set. This will lead to access terms that are more market oriented than any *ex post* definition of “reasonable” terms can be, once the standard is adopted.
- Para. 252 should make clear that the conditions set out in the Guidelines do not apply to industry standards that emerge in the absence of an agreement or concertation between different players (*de facto* industry standards).

- The main concern under Article 101 TFEU is the restriction of competition that can occur when a standard is adopted. Nevertheless, the Guidelines also address the potential hold-up that can result from an IPR that becomes crucial because of the standard (patent hold-up). Patent hold-ups can result in vertical competition issues created by licensing terms or in the abuse of a dominant position where the IPR leads to a situation of dominance. These issues fall outside the scope of the Guidelines and should be more clearly distinguished from the assessment under Article 101 TFEU whether or not the setting of a standard restricts competition and can be justified.

7.2 The definition of an object restriction is too broad. In para. 268 of the Guidelines, the Commission states that any provision “which influences the prices charged to customers” will amount to an object restriction. This should be defined more narrowly. Where a standard aims to generate efficiencies while having an impact on prices, it should be assessed on the basis of its effects.

7.3 The safe harbour provisions are too limited. The Guidelines state that where standard setting agreements do not fall within the safe harbour, they will require individual assessment (para. 276). Yet, what follows from the Commission’s analysis is the implication that such agreements would infringe Article 101(1) and be unlikely to be exempted under Article 101(3).⁸ It would be beneficial if the Guidelines explicitly confirmed that no presumption of illegality exists in this situation.

7.4 The Guidelines do not deal with agreements that fall outside the safe harbour. Additional guidance would be welcomed in situations where the cumulative criteria for the safe harbour requirements are not met, particularly in light of the way in which the safe harbour provisions are currently construed.

Linklaters LLP
25 June 2010

Contacts:

Dr. Bernd Meyring

Rechtsanwalt, Competition/Antitrust

Tel: +32 2505 03 32

Email: bernd.meyring@linklaters.com

Emma Verghese

Solicitor, Competition/Antitrust

Tel: +32 2501 92 60

Email: emma.verghese@linklaters.com

⁸ For example, see the Commission’s analysis in its example in para. 316 of the Guidelines regarding IPRs, in which the standardisation agreements falling outside the safe harbour would be likely to “give rise to restrictive effects on competition within the meaning of Article 101(1) and are unlikely to meet the criteria of Article 101(3).”