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Re: *Comments of O'Melveny & Myers LLP on the Commission's
Review of the Competition Rules Applicable to Horizontal
Agreements*

Dear Sirs,

We are pleased to enclose O'Melveny & Myers LLP's submission in response to the Commission's consultation regarding the draft Regulation on the application of Article 101(3) of the Treaty to categories of research and development agreements, the draft Regulation on the application of article 101(3) of the Treaty to categories of specialization agreements, and the draft Communication from the Commission, Guidelines on horizontal co-operation agreements.

O'Melveny & Myers LLP would be happy to further discuss any points in the attached document which the Commission finds unclear or wishes to see further elaborated.

Yours sincerely,



Riccardo Celli

**DRAFT REGULATION ON THE APPLICATION OF ARTICLE 101(3) OF THE
TREATY TO CATEGORIES OF RESEARCH AND DEVELOPMENT
AGREEMENTS, DRAFT REGULATION ON THE APPLICATION OF ARTICLE
101(3) OF THE TREATY TO CATEGORIES OF SPECIALISATION
AGREEMENTS, AND DRAFT COMMUNICATION FROM THE COMMISSION,
GUIDELINES ON HORIZONTAL CO-OPERATION AGREEMENTS**

COMMENTS OF O'MELVENY & MYERS LLP

1. INTRODUCTION

- 1.1. This document contains the comments of O'Melveny & Myers LLP on the Commission's draft Regulation on the application of Article 101(3) of the Treaty to categories of research and development agreements (the "draft R&D BER"), the Commission's draft Regulation on the application of Article 101(3) of the Treaty to categories of specialization agreements (the "draft Specialization BER"), and the draft Communication from the Commission, Guidelines on horizontal co-operation agreements (the "draft Guidelines").
- 1.2. This document is set out in two parts:
 - Section 2 – General Overview; and
 - Section 3 – Substantive Issues.
- 1.3. O'Melveny & Myers LLP welcomes the opportunity to comment on the draft R&D BER, the draft Specialisation BER and the draft Guidelines, and would be happy to discuss any points in this document which the Commission finds unclear or wishes to see further elaborated.
- 1.4. These comments are based on the extensive experience of O'Melveny & Myers LLP in advising and representing market participants, both within the EU and across the globe. The comments are not submitted on behalf of any of O'Melveny & Myers LLP's clients and cannot be attributed to them in any way.

2. GENERAL OVERVIEW

- 2.1. It is acknowledged that the general policy rationale underpinning both the draft R&D BER and Specialisation BER remains largely unchanged for good reason. R&D and specialization agreements have successfully benefitted from exemption for a number of years, and the Commission's proposal to extend this benefit until 2022, with few material amendments, is welcomed.
- 2.2. In contrast, we note that the existing guidelines have undergone a substantial revision, and are now considerably longer and more detailed. The draft Guidelines provide a more workable framework within which parties can self-assess various types of horizontal arrangements with greater certainty and confidence. The draft Guidelines further clarify the conditions which can justify horizontal agreements under Article 101(3), illustrating the various sections with an increased number of helpful and

detailed examples. These developments are generally beneficial to the overall functioning and application of both block exemption regulations and self-assessment of agreements outside the safe-harbour.

3. SUBSTANTIVE ISSUES

A. Issues common to both the draft R&D BER and draft Specialisation BER

Potential competitors

- 3.1. As before, horizontal agreements between an undertaking and a potential competitor will only be exempted if their combined market shares fall under the respective competitor market share thresholds. However, we note that the draft BERs and draft Guidelines now introduce a theoretical three year timeframe for future market entry within the definition of "potential competitor".
- 3.2. It is submitted that the proposed timeframe will generally make it more difficult for parties to undertake the correct market share threshold assessment. A party to an agreement is not likely to have access to information in every situation which will enable it to confirm with certainty whether another party is in fact a "potential competitor", and especially within the extensive timeframe of three years. The draft Guidelines further complicate the issue, advising only that such determination should be made on "reasonably objective grounds".
- 3.3. We further note that the Technology Transfer Block Exemption Regulation¹ already provides for a "one to two year" timeframe to apply to any "potential competitor" analysis. The more extensive timeframe provided within the draft horizontal BERs will clearly make it more difficult for parties assessing their R&D or specialization agreements not to constitute "actual or potential competitors" and will thereby easily fall within the lower market share threshold tests. We are of the view that the Commission should further substantiate the reason for this difference in assessment between "potential competitors" between various BERs or standardize the applicable periods involved.

Market share thresholds

- 3.4. The draft BERs each maintain the existing market share thresholds, ignoring a number of suggestions made during the preliminary stakeholder consultation to allow larger firms to benefit from the BERs. Given that many businesses across Europe have been severely disadvantaged by the recent economic recession, it is important that the Commission is not seen to discourage companies from undertaking joint R&D work.
- 3.5. Consequently, it is arguable that a slight increase in the market share threshold of the draft R&D BER may assist in encouraging slightly larger companies to share the not insignificant risk of R&D investment (particularly in the current economic climate) through collaboration, ultimately resulting in benefits for the end consumer.

¹ Commission Regulation (EC) No. 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements.

B. The draft R&D BER

Disclosure of intellectual property rights (IPRs)

- 3.6. The draft R&D BER clarifies that application of the block exemption is only available if prior to commencing the R&D, all parties agree that they will disclose in an open and transparent manner all existing and pending IPRs relevant for the exploitation of results by the other parties. This is a welcome clarification which ensures that no individual party can unduly prejudice the exploitation of the results by the others, ultimately depriving customers and consumers of the benefits of the joint R&D undertaken.
- 3.7. The draft R&D BER also specifies that parties are to have "equal" access to the results of joint R&D, for the purpose of further research and exploitation, slightly amending the scope of the current exemption. This is also to be welcomed since it will prevent parties from abusing a position of strength, and should ultimately result in a more competitive product offering for the end consumer.

Specialisation in R&D

- 3.8. The new definition of joint "specialisation in research and development" contained in the draft R&D BER specifically provides that so-called "paid for research" is no longer regarded as "joint", i.e. where one party undertakes all the R&D and the other party merely finances these activities or exploits such research.
- 3.9. This clarification alters the meaning of "joint" R&D/exploitation activities pursuant to Article 2 of the draft R&D BER. However, it is also observed that the conditions for exemption contained in Article 3 of the draft R&D BER still maintain that an agreement will be eligible for exemption even where a research institution agrees to confine its use of the results solely for the purposes of further research, without normally being active in the exploitation of results. On the basis that the combination of these provisions is somewhat misleading, we would welcome further clarification of this issue, potentially in the draft Guidelines.
- 3.10. However, it is observed that in the position where "paid for research" is no longer exempted pursuant to the draft R&D BER, such arrangements will instead require individual analysis under Article 101. This would be likely to place the undertakings funding the research in an uncertain legal position, since in general Article 101 suggests that preventing research institutions from exploiting the applicable IPRs is anticompetitive. Consequently, the undertaking funding the research may have to concede to grant some commercialization rights to the research institutions during pre-agreement negotiations. One potential result of this could be that undertakings which are reluctant to lose control of their IPRs will simply be deterred from entering into such arrangements altogether. We are of the view that such a position should be avoided in general, and request that the draft Guidelines provide some form of further guidance on this potential issue.

C. The draft Specialisation BER

- 3.11. We do not have any material comments to make in relation to the draft Specialisation BER. However, we welcome the clarification of its application in the case that parties enter into a specialisation agreement on the basis that one party agrees to “fully or partly” cease production. The existing Specialisation BER is somewhat unclear in terms of whether the exemption would apply in the situation that one of the parties to the agreement only partly ceases production, but the draft Specialization BER clearly affirms that it does.

D. The draft Guidelines

Information exchange

- 3.12. The addition of a comprehensive section on information exchange to the existing guidelines is a welcome improvement, since it means that both undertakings and legal advisors will no longer have to rely on a combination of case-law and other sector-specific rules for guidance on this area. It is acknowledged that the Commission has previously developed substantial guidance on exchange of information in the context of liner shipping, and the draft Guidelines expand further on this advice in a general context. We are of the view that the section on information exchange contained in the draft Guidelines is well structured and offers sufficient detail in certain key areas.
- 3.13. The draft Guidelines confirm that information exchange can be pro-competitive and provide detailed examples of economic benefits that may lead to efficiency gains and/or serve to justify anti-competitive behaviour, which are extremely useful. In light of the increasing fines imposed by the Commission on cartel participants, and the recent decision of the ECJ in *T-Mobile*², confirming that even an isolated exchange of information at a single meeting can be restrictive of competition, such guidance is vital to enable undertakings to assess their compliance with EU competition law and properly understand the Commission’s position on this matter.
- 3.14. However, we are somewhat surprised that the Commission has felt it necessary to include a disclaimer that the entire section on information exchange is “not intended to give any guidance as to what does and does not constitute a cartel”, presumably to avoid the draft Guidelines being relied upon in cartel proceedings by the investigated parties. However, we are of the view that the inclusion of this statement is likely to lead to uncertainty as to the overall reliability of the guidance. The aim of most parties reading it will be to assess their behaviour for the sole reason of avoiding falling foul of anti-cartel law in the first place.

Standardisation agreements & standard terms

- 3.15. Drawing on the recent experience of the *Rambus*³ and *Qualcomm*⁴ investigations, the major overhaul of the chapter on standardization agreements and standard terms in the draft Guidelines is to be welcomed.

² General Court, Case C-8/08 *T-Mobile Netherlands and others*.

³ Case COMP/38.636 – *Rambus*.

⁴ Case COMP/39.247 – *Qualcomm*.

- 3.16. The draft Guidelines provide that the standard setting process must be unrestricted, transparent and have a clear and binding policy which obliges IPR holders to license their IPRs on FRAND terms. These conditions are clearly intended to avoid hold-ups caused by IPR owners refusing license requests or charging abusive royalty rates, and are likely to lead to an improvement in the competitive landscape (particularly in view of the above-mentioned cases).
- 3.17. It is acknowledged that the draft Guidelines suggest that *ex ante* disclosure of the most restrictive licensing terms (including maximum royalty fees) would constitute an effective and competition law compliant FRAND IPR standardization policy for standard-setting organizations. However, we are of the view that whilst this is not an obligation, complying with the guidance will nevertheless detract from the value that could otherwise be achieved by the IPR holder. In the case that undertakings with large patent estates and superior technology are ultimately deterred from entering into standardization agreements, this could lead to inferior standards in the marketplace and less innovation overall. It is therefore submitted that the draft Guidelines should address this potential issue.

Parent companies & joint ventures

- 3.18. The draft Guidelines provide that where a parent company jointly exercises “decisive influence” over a joint venture, the relevant parent and joint venture company will not be treated as “separate undertakings”, and consequently agreements between the parent and joint venture company will fall outside the prohibition contained in Article 101.
- 3.19. Whilst in some ways this may be regarded as a positive interpretation for parent and joint venture companies from an Article 101 perspective, it is submitted that the reasoning behind this “concession” is materially illogical. First, the draft Guidelines completely fail to address or explain how one parent can have “decisive influence” over the joint venture where there is also “joint” control by *both* parents.
- 3.20. Second, it is well known that this broad interpretation derives from other previous Commission decisions, finding joint venture parent companies liable for the anticompetitive activities of the joint venture. However, in general such an interpretation in itself applies the concept of a “single economic unit” rather liberally. Whilst joint ventures and parent companies may be seen to benefit from the adoption of this interpretation, the main consideration should really be whether the agreement between a parent and its joint venture company could in fact restrict competition. We note that this has not really been addressed in the draft Guidelines.

Integrated agreements

- 3.21. Finally, the draft Guidelines offer additional clarification on their application to agreements covering more than one type of co-operation, for example an agreement that provides for joint R&D and the joint production of a given product. The “centre of gravity test” contained in the existing guidelines has therefore been replaced, and an undertaking is now required to consult all the different chapters relevant to the integrated agreement when conducting its self-assessment. Such an obligation is clearly

more onerous, and undertakings will have to conduct a considerably more detailed analysis on their agreements, increasing the applicable costs and time expended.

- 3.22. The Commission has attempted to address the issue of dealing with the situation where the chapters consulted contain “graduated” messages. However, it is evident that the proposed approach appears more likely to result in increased uncertainty (and also confusion). The Commission’s rationale for altering the existing test also remains unclear. We therefore submit that in the case that the new approach is to be retained, the Commission clarifies its application, allowing for a more workable solution which will allow parties to undertake a reliable self-assessment.

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