

**European Commission consultation on the revised rules for the assessment of horizontal cooperation agreements under EU competition law**

The Simmons & Simmons EU, Competition & Regulatory Group welcomes the opportunity to respond to the Commission's consultation on the revised rules for the assessment of horizontal cooperation agreements under EU competition law. The primary focus of our response is on the draft Guidelines, with our comments on the draft Block Exemptions incorporated as appropriate.

**General comments**

Broadly, we consider the draft Guidelines to provide a helpful and detailed outline of the Commission's approach to assessing horizontal cooperation agreements.

In principle, the guidelines on the competitive assessment of information exchange which were requested by stakeholders in the initial 2008/2009 consultation are particularly welcome, as this is an area of law which is uncertain in its practical application. We do have some reservations (see 2.2 below). Inclusion of this new section in the Guidelines triggers a more fundamental question, however. Guidance on information exchanges is now to be found in the Guidelines on the application of Article 81 of the EC Treaty to maritime transport services (the Maritime Guidelines), which are focused on that sector but of wider application by analogy, and as proposed, in the draft Guidelines, which necessarily limits discussion of exchanges of information leading to a cartel. Although there are arguments in favour of locating guidance in the revised Horizontal Guidelines, we believe that there are stronger arguments in favour of a standalone, comprehensive set of guidelines relating to information exchanges which draws together analysis in relation to both cartels and co-operation agreements.

Similarly, the reworked section of the guidelines on standardisation throws into relief the lack of guidance on how businesses should attempt to enforce standards once they have been established and how the Commission will approach enforcement. Article 102 has an important role to play in addition to Article 101, yet detailed guidance on Article 102 would clearly be misplaced within guidelines on the horizontals regime under Article 101. However, neither is guidance provided in the existing 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings', which excludes exploitative abuses from its scope, and does not address the specifics of exclusionary abuses in the context of standards. There is therefore a real need for guidelines that address all aspects of enforcing standards.

We query whether some of the shifts in terminology between the old Guidelines and the proposed Guidelines are helpful – for example the introduction of the concept of “the most upstream indispensable building block” rather than the “centre of gravity” test. Where new terminology is introduced, it would be helpful also to have examples of how the term will be applied in practice and clear indicators of how (if at all) it differs from the term previously used. Of more concern, however, is the Commission's use of familiar terms (for example potential competitor (see below, section 1)) in ways that diverge from other Commission documents. In our view, terminology should be used consistently over time and across Commission documents, to avoid confusion.

In general, we find the examples included provide practical advice to the business community. However, a number of the examples are too simple to be of assistance - the examples are most useful where they exemplify a type of conduct that is permitted under the Guidelines or provide an alternative solution to an otherwise prohibited course of conduct that would bring it within the

rules. Examples that demonstrate the Commission's approach in less obvious or border line cases offer more value rather than those that illustrate a point that is obvious from the text.

## **Specific comments and suggestions for amendment**

### **1. Introduction**

#### *Paragraph 10 (potential competitors)*

The definition of potential competitor as an undertaking which is likely to enter the market within a "short period of time" differs both from the definition provided in the draft Research and Development Block Exemption (draft R&D Regulation) ("within no more than three years") and to the Guidelines on the Application of the Technology Transfer Block Exemption Regulation (TTBE Guidelines). It is unclear how a "short period of time" is to be interpreted, and the relationship that it has to the (maximum) three year period provided for in the draft R&D Regulation and the one to two year period, extendable on a case by case basis, in the TTBE Guidelines. At the very least, it would be helpful to align the definition of a "short" period of time with that in the Verticals Guidelines i.e. "within a short period of time normally not longer than one year and to include the phrase on "realistic grounds and not just as a mere theoretical possibility".

#### *Paragraphs 50 and 51 (complementary skills)*

We note the strengthened focus on complementary skills or assets in the draft Guidelines, and in particular the statement that efficiency gains are less likely to benefit consumers where agreements do not involve complementary skills or assets. The Commission indicates that fixed cost savings are more likely through agreements that do not involve companies with complementary skills, and the fixed cost savings are less likely to result in benefits to consumers. It therefore concludes that there are less likely to be efficiency gains where undertakings do not have complementary skills. We would welcome reassurance, however, that the Commission would be prepared in appropriate cases to take a more nuanced view in applying the criteria under Article 101(3) where complementarities are not driving the agreement.

### **2. Information exchange**

Whilst in principle welcoming the new section on information exchange (subject to our preference for standalone guidelines as mentioned above) we believe that, as drafted, the guidelines do not provide sufficient certainty on a number of issues. Without a clear sense of what is acceptable, business are likely to err on the side of caution and refrain from attempting to apply the Article 101(3) criteria. Adopting a conservative position on information exchange is ultimately likely to stifle benign exchanges of information which will result in fewer pro-competitive benefits being passed to consumers.

#### **2.1 Section 2.2.2 (restriction of competition by object)**

##### *Paragraphs 67-68 (collusive outcomes)*

The Commission indicates in paragraph 67 that exchanges of information on intentions for future conduct regarding prices or quantities are particularly likely to lead to a collusive outcome, and in paragraph 68 that these should be regarded as restrictions of competition by object. Essentially, then, these are hardcore restrictions which amount to a cartel, and which, as the Commission points out, are not the focus of these Guidelines. The draft Guidelines go on to characterise other types of information exchanges that will be regarded as restrictions by object: information on current conduct that reveals intentions for future conduct and combinations of different types of data which enable the direct deduction of intended future prices or quantities. We would argue that these types of information exchange that relate to conduct from which future intentions can be deduced or which indirectly discloses future conduct are not necessarily restrictions by object,

and might more properly be categorised as effect infringements. We suggest that in all cases these should be addressed with regard to the appropriate relevant market to determine the potential for a restrictive effect on competition.

If the exchanges that have this “indirect” collusive outcome are, despite our view above classified as restrictions by object, would the Commission be prepared to scrutinise them under Article 101(3) to assess whether their effects could nonetheless be outweighed by efficiency gains? We consider that it should, in line with the outcome of the *GlaxoSmithKline Services Unlimited v Commission*<sup>1</sup>. It would be helpful if the Commission were to elaborate on when, if at all, restrictions by object relating to information exchange would be analysed under Article 101(3), and to incorporate some comment upon them in the appropriate section, as it has done in relation to other categories of agreement.

## 2.2 Section 2.2.3 (Restrictive effects on competition)

### *Paragraph 74 (transparency)*

The Commission suggests in paragraph 74 that collusive outcomes are more likely in transparent markets. However, the opposite could equally be argued, namely that collusive outcomes are less likely in transparent markets. Where there is transparency, there are fewer incentives for undertakings to collude: instead, participants in the market can simply respond individually to changes without reaching an understanding on their actions. However, we take the Commission’s point that information exchange can increase transparency and that the real issue is the contribution that an information exchange makes to increasing a low pre-existing level of transparency to the point at which collusion is facilitated. In those circumstances, appreciable negative effects could flow from the information exchange. Our suggestion would be to delete the first sentence of the paragraph and insert the words “in a market” after the first word in the second sentence. This would refocus the paragraph on the real issue, namely the role that information exchanges could play in facilitating collusion.

### *Paragraph 86 (historic data)*

Paragraph 86 in conjunction with footnote 57 suggests that the Commission is moving away from its view that on a case by case basis, data more than one year old may be considered to be historic and therefore less likely to restrict competition<sup>2</sup>. This shift contrasts with the position taken in the Maritime Guidelines, which refer uncritically to the Commission’s previous approach to assessing data as historic above one year old, although acknowledging that age should be assessed flexibly. The proposal instead to assess whether data is historic by reference to the average length of contract in a particular industry is likely to prove unwieldy and uncertain, as in many industries it may not be possible to determine either an average “type” of contract or average duration. What constitutes “several” times older is also not clear (see also our comment on paragraph 102 below).

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<sup>1</sup> Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services Unlimited, formerly Glaxo Wellcome plc (C-501/06 P), Commission of the European Communities (C-513/06 P), European Association of Euro Pharmaceutical Companies (EAEPC) (C-515/06 P), Asociación de exportadores españoles de productos farmacéuticos (Aseprofar) (C-519/09 P) v Commission of the European Communities, European Association of Euro Pharmaceutical Companies (EAEPC), Bundesverband der Arzneimittel-Importeure eV, Spain Pharma SA, Asociación de exportadores españoles de productos farmacéuticos (Aseprofar)*

<sup>2</sup> Commission Decision 92/157/EEC of 17 February 1992 in Case IV/31.370 — UK Agricultural Tractor Registration Exchange (OJ L 68, 13.3.1992, p. 19), paragraph 50

## 2.3 Section 2.4 (Examples)

### *Paragraph 102 (historic data)*

Example 5 does not contribute clarity to the assessment of what constitutes historic data. It is clear that under the proposed test of historic data, the situation outlined would not be caught by Article 101(1), the age of the data being twelve times the duration of the average contract described and three times older than the rule of thumb of one year that the Commission has considered in past cases. As pointed out above, in our view, examples that are borderline provide guidance of the type most needed, rather than scenarios where the analysis is unchallenging.

## 3. **Research & Development Agreements: the draft R&D Regulation and Guidelines**

### 3.1 **Draft R&D Regulation Article 1, Definitions**

#### *Article 1, paragraphs 12 and 13 (specialisation):*

Articles 1(12) provides a definition of the concept of “specialisation in research and development”, which is in principle welcome. However, in our view, the proposition that each of the parties must carry out “some” of the research and development activities is unclear. How little will suffice in order for the activities to be defined as specialisation in or even as undertaken “jointly”? Paragraph 12 provides an example of a situation which does not meet the requirement that “each party carries out some of the research and development activities”, namely if one party carries out all the research and development activities and the other party finances it. However, it remains unclear how other cases should be treated, for example, where one party does research and development and the other provides know how and IP rights. The phrase “focus on distinct areas” raises similar questions. How distinct must the areas be? Can there be a degree of overlap? The Guidelines are silent on these points.

Similarly Article 1(13) defines “specialisation in exploitation” including a requirement that each of the parties must carry out “some” of the exploitation of the results. Again it is unclear how much of the distribution activities must be carried out by a party in order to trigger the definition “specialisation in exploitation”, and whether minimal distribution is sufficient.

#### *Article 1, paragraph 16 (potential competitors)*

Paragraph 16 defines a “potential competitor” as someone who, within not more than three years, would be likely to undertake the necessary additional investments or other necessary switching costs in order to supply a product. In principle, a limit is helpful, since the previous regulation threw no light on the matter. However, in our view, if the three year cap became the norm, this would be too long a period, and if applied across all markets, too generic: it fails to take into account the structure of the market and the nature of the restrictive agreement at hand. If it fails to become a norm, then there is no indication as to when the period would be towards the upper limit, and when the shorter and is therefore in our view, too uncertain. As pointed out in section 1 above, a matter of principle, we believe that there should be consistency of definitions across Commission documents. We would advocate the adoption of the (normally) one-two year period specified in the TTBE Guidelines, with the potential, as under the TTBE, to extend the time period in individual cases. At the very least, as we comment above, the definitions in the Verticals Guidelines and the Horizontal Guidelines should be aligned.

### 3.2 **Draft R&D Regulation, Article 3 (2) and (4) (conditions for exemption)**

Article 3(2) states that the parties to the agreement must agree that, prior to starting the research and development, all parties will disclose relevant existing and pending IP rights. This would mean that the parties may also disclose this information after signing the agreement. Article 3(4)

states that the parties to the agreement must stipulate in their agreement that each party must be granted access to any pre-existing know how of the other party indispensable to its exploitation of the results.

It is not immediately clear to us why the agreement should not also stipulate that relevant IP rights must be disclosed prior to the research and development beginning, and why there is no time requirement for the relevant pre-existing know how to be disclosed. In our view, logically, both obligations and an appropriate time frame for each should be stipulated in the agreement, or else there is potential for abuse. In addition, the draft R&D Regulation is silent as to whether remuneration may be demanded for disclosure of know how. It would therefore be helpful if the Guidelines gave some indication as to whether conditions can be imposed in relation to the disclosure of know how, or whether the obligation is fixed.

### **3.3 Draft R&D Regulation, Article 5 (hard core restrictions)**

We very much welcome the most significant change in the draft R&D Regulation, namely the recasting of Article 5(e) of the hard core restrictions. Under Regulation 2659/2000, a restriction as to the customers that the parties could serve after the expiry of a seven year period beginning from the date that the product was first put in the market in the European Community was categorised as hardcore. This meant that during the first seven years, the parties were able to restrict sales to particular customers. Under the draft R&D Regulation, and in line with the verticals regime, restrictions on active sales to customers or territories which have been exclusively allocated to one of the parties by way of specialisation in exploitation are permitted throughout, but restrictions on active sales into territories or customers that have not been exclusively allocated are prohibited. However, whilst we welcome the shift, we note that the drafting of Article 5(e) is singularly opaque, in particular because of the use of the double negative, and believe that some redrafting would be of assistance.

### **3.4 Section 3.3.3 draft Guidelines (restrictive effects on competition)**

#### *Paragraph 127*

Paragraph 127 states that research and development agreements are only likely to have a restrictive effect on competition where the parties have “market” power on the relevant market and/or competition is “appreciably” reduced. The first term has replaced the word “significant”, the second, “significantly”. Although appreciability appears to us to be the legally better test, we would regret it if this were a signal that the Commission was intending to take a stricter view of research and development agreements than previously, as we believe them to be a crucial source of innovation.

## **4. Production agreements and the draft Specialisation Regulation**

### **4.1 Section 4.1 Definition and scope**

#### *Paragraph 144 (joint production )*

Paragraph 144 of the draft Guidelines distinguishes between production agreements made jointly by way of a joint venture, and those carried out through looser forms of cooperation such as subcontracting. Although the draft Specialisation Regulation (and indeed Regulation 2658/2000) does not provide so, the draft Guidelines appear to limit joint production to circumstances in which a jointly controlled joint venture carries out the production. This seems to us unnecessarily to narrow the meaning of joint production.

## *Paragraph 146 and Article 2(1)(b) draft Specialisation Regulation (unilateral and reciprocal agreements)*

As regards unilateral specialisation agreements, we note that Article 2(1)(a) of the draft Specialisation Regulation now requires parties to be active on the same product market, but no longer requires that each party should fully cease production or refrain from producing the product in question for an agreement to fall within the block exemption. It may instead partly reduce its production. However, the issue of how small a reduction is required remains unclear.

The requirement for both parties to a reciprocal specialisation agreement to be active on the same product market but to cease or refrain from producing different products (draft Specialisation Regulation Article 2(1) (b)) could potentially be confusing. However, any potential confusion could be easily remedied through including an example explaining that this is most likely to be the case in situations where the parties produce components or intermediate products for items which they each individually produce, or (perhaps less relevantly) where the parties choose to concentrate on particular types of product, (eg high end versus low end). Paragraph 146 could usefully be clarified to that effect.

### **4.2 Section 4.3.3 Restrictive effects on competition**

#### *Paragraphs 162-167, market power and Article 3, draft Specialisation Regulation (market share threshold)*

Article 3 of the draft Specialisation Regulation narrows the scope of the block exemption by applying the combined market share threshold of 20% to any relevant market, rather than the relevant market for the product. The Commission's expanded explanation of the importance of spillover markets (Section 4.2 of the draft Guidelines) in this regard is helpful. We also welcome the deletion of the requirement for a market to be "very" dynamic (paragraph 165) in order for the risks of restrictive effects to be low even where market shares of the parties and the market concentration is high. A dynamic market, with entry and market positions changing frequently is in our view a sufficient constraint on the behaviour of the parties to the agreement, without the additional adjective, which in itself threw up difficulties of interpretation.

### **4.3 Section 4.5, Examples.**

We find the first example (paragraph 181) too simple to be of assistance – the fact that this does not offend against competition principles is clear. Example 5, in contrast, which deals with a specialisation agreement as market allocation that comes close to constituting a cartel, provides an alternative solution that would bring elements of the envisaged co-operation within the competition rules. This type of guidance is genuinely useful to business people, whose focus remains not on what they cannot do, but what they are allowed to do. There is similarly helpful guidance in example 8, (paragraph 187). As we mention in our introductory remarks, we would welcome further examples of this type throughout the Guidelines.

## **5. Purchasing agreements**

### **5.1 Definition**

#### *Paragraph 189 (small and medium enterprises)*

We welcome the omission of any direct references to arrangements between SMEs, which under the old guidelines, were considered in general "pro-competitive". We agree that the assessment of agreements involving SMEs should properly be carried out according to the general rules, taking into account the relevant market shares.

## *Paragraph 191 (interplay with rules on vertical restraints)*

Many responses to the Commission's initial stakeholder consultation asked for clarification on the interplay between the rules on vertical restraints and those on horizontal co-operation. The new guidelines remain unchanged on this point. The only amendment is the express mention of "buying alliance", previously included in the general definition of "association formed by a group of retailers" (paragraph 191).

However, we welcome the clarification now offered in relation to purchasing agreements between a joint venture and its parent companies, for which the "two-stage" assessment (first under horizontal guidelines and then under vertical regulation and guidelines) is inappropriate. As paragraph 11 of the draft Guidelines confirms, in line with *Avebe*<sup>3</sup> "(A)s 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".

## **5.2 Restrictions of competition by effect**

### *Paragraph 201 (the concept of a "disguised cartel")*

We welcome the Commission's confirmation in the draft Guidelines that a restriction of competition by object is not created when the parties only agree on the prices to be paid for the products within the scope of the purchasing agreement, and that an assessment of whether restrictive effects on competition are likely, must be carried out in light of the overall effect on the market. However, the reference to this analysis being appropriate in "both" scenarios is unclear to us. Does it suggest that, in line with the outcome of *GlaxoSmithKline Services Unlimited v Commission*, restrictions by object will also be approached in this way? If that is the case (as we believe it should be), we wonder why a similar statement is not made in respect of, for example, information exchanges that may constitute a restriction by object, but which do not amount to a cartel (see our comments above, paragraph 2.1).

## **5.3 Main competition concerns**

### *Paragraph 195-199 (anti-competitive buying power)*

In contrast to the old Guidelines no reference is made to "market share significantly above 15% in a concentrated market". We welcome this change since it clearly demonstrates that there will be no presumption that agreements in certain types of market will fall under Article 101(1).

## **6. Commercialisation agreements**

The inclusion of "substitute products" and "after sale" services within the scope of commercialisation agreements is welcome as a clarification of the parameters of this type of agreement.

### **6.1 Definition of commercialisation agreements**

#### *Paragraphs 221-222 (vertical agreements between competitors)*

As far as distribution agreements are concerned, the amendments to paragraph 221 reflect changes to the new vertical Guidelines, which no longer impose a €100 million annual turnover threshold for a competing buyer entering into a non reciprocal vertical agreement. However, the

<sup>3</sup> Case T-314/01 *Avebe v Commission*

paragraph 222 amendments are somewhat confusing, as the references to non-reciprocal agreements between competitors “exceeding a certain size” have no obvious referent in the absence of the buyer’s turnover threshold and the meaning of “a certain size” in this context could therefore be usefully clarified. Whilst the 15% combined market share threshold clearly identifies which agreements fall outside the block exemption, the notion of the “size” of the competitors, rather than the degree of their market power, does not assist with analysis.

In general terms the examples in this section are clearer and more detailed than in the existing Guidelines, with the exception of example number five (paragraph 251 - non-poaching clause in agreement on outsourcing of services), which appears somewhat long and confusing, and would benefit from some redrafting.

## 7. **Standardisation agreements**

We welcome the fact that the Commission has expanded its guidance on standardisation agreements and in particular standard-setting organisations. We recognise that much relevant case experience of the Commission relates to Article 102 cases and support the fact that the Commission uses this opportunity to address these issues in the round without confining itself solely to the Article 101 issues.

### 7.1 **Restrictive effects on competition**

*Paragraphs 284-285* (establishing the FRAND rate)

We support the inclusion of a requirement to licence on FRAND terms. However, we consider that further guidance is required on the following points:

- What are the factors that will be assessed in deciding whether the fees bear a “reasonable” relationship to the economic value of the patents?
- How will the Commission go about establishing the rates actually charged and what safeguards can be put in place to ensure that evidence from a dominant undertaking is not the only source of information on the rates charged at any given time?
- What factors are likely to lead to the Commission concluding that such a comparison can be made “in a consistent and reliable manner”?

In addition, we believe that the Commission should clearly state that when comparing licensing fees charged *ex ante* and *ex post* the standard, it will view any increase in fee after the adoption of the standard as sufficient to establish a non-FRAND rate.

### 7.2 **Pre- and post- membership of a standard-setting organisation**

The Commission does not address the issue of the duration of the obligations and the point at which they are triggered. For example, is an undertaking obliged to license on FRAND terms after leaving an organisation through which it obtained information that contributed to its patents forming an essential part of a standard? Similarly, how would Article 101 apply where information is passed from a member to a non-member organisation and IPR belonging to the non-member is then incorporated in the standard?

### 7.3 **Rationale for protection under Article 101 and relationship with Article 102**

We suggest that the sentence in paragraph 275 “(T)he establishment of standards ... can create or lead to abuses of a dominant position” should rather reflect the fact that establishment of

standards can create or lead to the creation of a dominant position. Abuse of that position is not *caused* by the standards, but only by the wrong-doing of the dominant undertaking.

What becomes evident is that a lacuna exists in terms of guidelines, namely what happens if the *ex ante* conditions set out in paragraphs 278-283 are breached. The Commission has not commented if, and how, such conduct could be dealt with under Article 101 but we believe that it is important that in such cases Article 101 is enforced vigorously. The Guidelines should state this clearly.

In addition, we consider that Article 102 provides a potent tool to deal with such conduct, and further guidance would be of assistance. In particular, we would welcome clarification on:

- The particular types of abuse that may be relevant in the context of standard-setting
- The way in which the Commission would analyse and deal with such behaviour

We acknowledge that the horizontal guidelines are not the appropriate place to locate that guidance but we are strongly of the view that guidance on the application of Article 102 in the context of standard setting is in any event needed, and would welcome the Commission's thoughts on the matter.

**Simmons & Simmons**  
**EU, Competition & Regulatory Group**

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