

Draft R&D Block Exemption Regulation
Draft Specialisation Block Exemption Regulation
Draft Horizontal Guidelines

Observations of Van Bael & Bellis

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I. INTRODUCTION

Van Bael & Bellis welcomes the opportunity to submit observations on the following draft documents (the "draft legislative package") prepared by the Commission:

- The draft Block Exemption Regulation on research & development agreements ("Draft R&D BER") intended to replace Commission Regulation No. 2659/2000;
- The draft Block Exemption Regulation on specialisation agreements ("Draft Specialisation BER") intended to replace Commission Regulation No. 2658/2000; and
- The draft Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements ("Draft Horizontal Guidelines") intended to replace the Commission's Guidelines of 6 January 2001 on horizontal cooperation agreements.

Overall, Van Bael & Bellis welcomes the amendments introduced by the draft legislative package to the legal regime currently governing the compatibility of horizontal cooperation agreements with Article 101 TFEU. Most of the modifications suggested in the draft legislative package are aimed at clarifying, rather than fundamentally altering, the current legal regime. This effort of clarification is particularly commendable in view of the modernisation and decentralisation of competition enforcement, which confers on private actors, EU national courts and Member States' competition authorities the often daunting task of assessing the lawfulness of horizontal cooperation agreements.

Beyond this overall positive assessment, the draft legislative package calls for a number of specific comments. These observations are set out below, following the structure of the Draft Horizontal Guidelines.

II. INTRODUCTORY PART OF THE DRAFT HORIZONTAL GUIDELINES

1. *Providing guidance for companies*

Overall, Van Bael & Bellis is of the opinion that the Draft Horizontal Guidelines provide satisfactory general guidance for companies in the assessment of the most common and straightforward types of horizontal cooperation agreements. Van Bael & Bellis fully understands that "*given the potentially large number of types and combinations of horizontal co-operation and market circumstances in which they operate, it is difficult to provide specific answers for every possible scenario*" (Draft Horizontal Guidelines, para. 7). However, in such circumstances and given the relative complexity of the Draft Horizontal Guidelines, as well as the limited scope of the safe harbours contained therein, Van Bael & Bellis would urge the Commission to review the rules concerning the adoption of guidance letters by the Commission and, in particular, the condition relating to the genuinely novel character of the legal question raised in the request for guidance.

Horizontal cooperation agreements are particularly important in order to promote innovation, develop new markets and more generally improve the competitiveness of EU industry. However, potential pro-competitive horizontal cooperation arrangements may well never materialise if parties incur even a small risk that their complex cooperation arrangement could be considered as falling under the very

broad “hardcore” category of agreements having as their object the “*limitation of output or sales*”, with the very real associated risk of substantial fines.

In addition, a significant limitation of the Draft Horizontal Guidelines is that they provide virtually no guidance on how to assess the compatibility of specific contractual restrictions imposed on parties to horizontal cooperation agreements. As a result, and taking into account the dearth of relatively recent cases and the lack of consistency in the older cases, self-assessment is extremely difficult both in the case of R&D/specialisation agreements where the market share thresholds of the two block exemptions are exceeded and in the case of the many types of horizontal cooperation that do not fall within the scope of the block exemptions at all. Furthermore, in contrast to vertical restraints, there are very few cases at national level to compensate for the lacuna at EU level in this area (which is not surprising given the important cross-border character of horizontal collaboration in the EU). Given the critical importance of restrictions such as non-compete obligations to the ex ante determination of whether investment in a potential project is commercially justified, this legal uncertainty may jeopardise pro-competitive projects of EU importance.

For these reasons, Van Bael & Bellis submits that a company concerned about the legality of its proposed horizontal cooperation agreement should be able to ask the Commission for its view with respect to the compatibility of such cooperation with the EU competition rules (including individual restrictions) even where the cooperation is considered not to raise genuinely novel legal questions. In such a procedure, which could be similar to the Business Review Procedure of the US Department of Justice¹, the Commission would of course be able to refuse to consider a request for guidance.

2. The treatment of joint ventures

According to paragraph 11 of the Draft Horizontal Guidelines, Article 101 TFEU will not apply to agreements between a joint venture and each of the parent companies that jointly exercise decisive influence and effective control over it, provided that the agreement setting up the joint venture does not infringe EU competition law. Van Bael & Bellis welcomes such a development in the treatment of joint ventures. However, the current wording of paragraph 11 is quite vague and Van Bael & Bellis would therefore urge the Commission to further clarify the practical implications of this change of policy.

For instance, since the Draft Horizontal Guidelines do not apply to joint ventures which constitute a concentration within the meaning of Article 3 of the Merger Regulation (Draft Horizontal Guidelines, para. 6), Van Bael & Bellis understands that paragraph 11 in any event applies to joint ventures which are not full function. But how are full-function joint ventures not falling under the Merger Regulation (because the thresholds for notification are not met) to be treated? Furthermore, does paragraph 11 mean that Article 101 TFEU will continue to apply to agreements between a full function joint venture falling under the Merger Regulation and each of

¹ It is in this respect noteworthy that that two of the most frequent types of business review requests the US Department of Justice receives would appear to involve proposals to form joint ventures or to collect and disseminate business information (see Department of Justice communication of 1 December 1992 on a pilot program announced to expedite business review process available at <http://www.justice.gov/atr/public/busreview/201659a.htm>).

its parent companies? This difference in treatment would be difficult to understand as parent companies could be said to "*jointly exercise decisive influence and effective control over*" both types of joint ventures (full function and non-full function). Moreover, as stated in the Draft Horizontal Guidelines (para. 30), there is often only a fine line between full function joint ventures that fall under the Merger Regulation and non-full function joint ventures that are assessed under Article 101 and their effects can be quite similar.

Also, Van Bael & Bellis is concerned about the issues that could potentially arise from the distinction between the creation of the joint venture itself, which is subject to Article 101 TFEU, and agreements concluded after the creation of the joint venture between the joint venture and each of its parent companies, which would not be subject to Article 101 TFEU. Thus, where for instance two companies having low market shares create an R&D joint venture entrusted with the production of jointly developed products, the creation of the joint venture will not in itself raise concerns under Article 101 TFEU. But does paragraph 11 of the Draft Horizontal Guidelines mean that the parties can then thereafter decide (through e.g., licensing agreements concluded between the newly created joint venture and each of its parent companies) to that one parent will exclusively sell its share of the joint venture's production in certain territories or to certain customers while the other will exclusively sell its share of the production in other territories or to other customers, even where each parent is prohibited from making passive sales into the other parent's territories or customer groups (i.e. otherwise hardcore restrictions when not concluded through a joint venture)?

Similarly, could the parties decide, again through, e.g., licensing agreements concluded between the newly created joint venture and each of its parent companies, that only one parent will exploit the results of an R&D joint venture within the EU? It is true that such a "specialisation in exploitation" is not covered by the Draft R&D BER, but if Article 101 TFEU does not apply to such licensing agreements between the joint venture and each of its parent companies, the parties then would not need to rely on the Specialisation BER.

Another example would be a production joint venture between non-competitors (A and B) which is entrusted with the production of products X and Z. Parent A currently has a market share of 40% for product X and parent B currently has a market share of 45% for product Z. Product X and product Z belong to separate product markets. Could each of the parents conclude, after the creation of the joint venture, an agreement under which the joint venture would sell 100% of its production of product X to parent A and 100% of its production of product Z to parent B, thereby allocating markets between parent A and parent B?

In conclusion, while paragraph 11 of the Draft Horizontal Guidelines is to be welcomed insofar as its purpose is to treat favourably agreements between a joint venture and each of its parent companies, Van Bael & Bellis would urge the Commission to further elaborate on this brief statement. This is even more important as paragraph 11 of the Draft Horizontal Guidelines is not based on the case law of the EU Courts (the *Avebe* judgment only concerns the liability of parent companies for a joint venture not having legal personality), nor on past Commission decisions, but rather represents a change in the Commission's policy and would, moreover, appear contrary to the decisional practice of some national competition authorities.

3. *The new "most upstream indispensable building block" test*

The introduction of a new test for determining which section of the Draft Horizontal Guidelines will apply to agreements combining different stages of cooperation (e.g., R&D, production and commercialisation of products) is to be welcomed. The former "centre of gravity test" was difficult to apply and a potential source of dispute. The "most upstream indispensable building block" test, according to which the most upstream indispensable building block of an integrated cooperation determines which chapter of the Guidelines serves as the starting point for the assessment of the entire agreement, will probably prove easier to apply in practice (Draft Horizontal Guidelines, para. 13).

4. *Framework for analysis*

On a more general level, Van Bael & Bellis notes that the Draft Horizontal Guidelines do away with the current distinction between three categories of agreements, i.e. those which almost always fall, those which may fall, and those which do not fall within the scope of Article 101(1) TFEU. This classification is replaced by a new structure which, for each type of agreement, identifies (1) the "main competition concerns", (2) the "restrictions of competition by object" and (3) the "restrictive effects on competition". This modification in the structure of the different chapters of the Draft Horizontal Guidelines, albeit probably driven by a laudable desire to achieve greater clarity, risks resulting in an increased severity in the assessment of horizontal cooperation agreements.

First, by removing the category of agreements which do not fall under Article 101(1) TFEU, the Draft Horizontal Guidelines deprive many cooperation agreements (i.e., mainly agreements between non-competitors and agreements between competitors that cannot independently carry out the project or activity covered by the cooperation) from the benefit of a *prima facie* positive assessment. The significance of this presumption of lawfulness should not be underestimated in the current decentralisation process, as it may help dispel any misgivings and preconceived notions in litigation before national courts which often have limited experience in the field of competition law.

Second, the new structure of the different chapters of the Draft Horizontal Guidelines seems to turn the classic distinction between "restrictions by object" and "restrictions by effect" into the *summa divisio* of any competitive assessment of horizontal cooperation agreements. However, the very contents of the category of restrictions by object remains unclear and controversial². Drawing a clear-cut line between effects-based and object-based restrictions could therefore give rise to serious misinterpretations at national level, with the risk of national authorities and courts being inclined to overuse the category of restrictions by object in order to avoid complex economic assessments.

² Thus, for example, paragraph 234 of the Draft Horizontal Guidelines identifies resale price maintenance in horizontal commercialisation agreements as a restriction by effect while resale price maintenance in vertical agreements is seen as a restriction by object in the Vertical Guidelines (paragraph 48).

III. INFORMATION EXCHANGES

Van Bael & Bellis welcomes the inclusion in the Draft Horizontal Guidelines of specific guidance on the competitive assessment of information exchanges, nine years after the Commission first indicated that such guidance would be forthcoming.³ In particular, Van Bael & Bellis welcomes the Commission's acknowledgment that information exchanges are "*very often pro-competitive*" (Draft Horizontal Guidelines, para. 58) and can lead to the intensification of competition or significant efficiency gains. In this respect, Van Bael & Bellis would point out that information exchanges between competitors are particularly pro-competitive in the case of markets characterised by large fluctuations of demand, where such exchanges can help actors on the market to effectively meet customer demand and avoid shortages or over-production.

The Draft Horizontal Guidelines distinguish between information exchanges that have the object of restricting competition (i.e., those that by their very nature have the potential to restrict competition) and those that have to be assessed on the basis of their effects. In the view of Van Bael & Bellis, the Draft Horizontal Guidelines take a rather simplistic approach to identifying the factors relevant to determine whether an information exchange is a restriction of competition by object. The Draft Horizontal Guidelines conclude that exchanging information on intentions of future conduct regarding prices or quantities is particularly likely to lead to a collusive outcome, and that exchanges between competitors of individualised data regarding future prices or quantities should therefore be considered a restriction of object within the meaning of Article 101(1) TFEU (Draft Horizontal Guidelines, paras. 67-68). However, in making this statement, the Commission appears to ignore its legal obligation to pay close regard to the economic and legal context of the exchange. Among others, the Court of Justice in *T-Mobile* confirmed that, in determining whether a concerted practice has an anti-competitive object, it must be capable "*in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition within the common market*" (emphasis added).⁴ The Court of Justice re-confirmed this approach more recently in *GlaxoSmithKline Services Unlimited v. Commission*,⁵ finding that in order to assess the anti-competitive nature of an agreement (including whether it has an anti-competitive object), "*regard must be had inter alia to the content of its provisions, the objectives it seeks to attain and the economic and legal context of which it forms a part*" (emphasis added).⁶ These findings of the Court of Justice would appear to require the Commission to take into account the specific context of the practice in question and to formulate a convincing theory of harm before it can be classified as a restriction of competition by object. In the Draft Horizontal Guidelines, in contrast, the Commission makes no reference to the assessment of the legal and economic context of information exchanges that allegedly restrict competition by object, nor does it indicate what factors should be taken into account when examining this context.

³ Guidelines on the applicability of Article [101 TFEU] to horizontal cooperation agreements, OJ 2001 C3/2, para. 10.

⁴ Judgment of 4 June 2009 in Case C-8/08 *T-Mobile Netherlands*, not yet reported, para. 31. See also para. 27 and para. 43.

⁵ Judgment of 6 October 2009 in Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, not yet reported.

⁶ *Ibid.*, para. 58.

In fact, Van Bael & Bellis considers that there are good arguments supporting the position that information exchanges are inherently unsuited to a restriction by object classification. Information exchanges arguably cover too broad a spectrum of conduct and their effects are too dependent on the relevant legal and economic context to approach their competitive assessment with anything other than an effects-based analysis. The Commission has not produced any clear justification for classifying such conduct in the same way as full-scale horizontal price-fixing.

Turning to more specific points in the Draft Horizontal Guidelines, the Commission states that information exchanges having the object of fixing prices or sharing markets or customers run the risk of being investigated and, ultimately, fined as cartels (Draft Horizontal Guidelines, para. 59). The Commission footnotes this provision with a citation to the *T-Mobile* judgment, stating that "*in order to find that a concerted practice has an anti-competitive object, there does not need to be a direct link between that practice and prices charged to final consumers*". In the view of Van Bael & Bellis, this is a very selective quote, as the Commission fails to mention that the Court of Justice in *T-Mobile* found that the information exchange in question (concerning remuneration paid to a dealer) was a "*decisive factor*" in fixing the prices to be paid by the end-user.⁷

Furthermore, in concluding that exchanges about "*intended future prices*" should be considered a restriction of competition by object, the Commission adds a footnote reference to explain that the "*notion of 'intended future prices' is illustrated in Example 1*" of the Draft Horizontal Guidelines (Draft Horizontal Guidelines, footnote 47). In Example 1, however, it seems that the Commission is referring to prices actually charged on the market, rather than intended future prices. Similarly, the Draft Horizontal Guidelines subsequently define the kinds of commercially sensitive information related to prices as "*actual prices, discounts, increases, reductions, rebates*" (Draft Horizontal Guidelines, para. 81) and do not appear to include any notion of intended future prices.

Regarding information exchanges that have the effect of restricting competition, the Commission states that market coverage is a relevant factor in that the companies involved have to cover a sufficiently large part of the relevant market (Draft Horizontal Guidelines, para. 71). Similarly, the Commission takes note of the relevance of whether the market is transparent (para. 73), whether it is oligopolistic (para. 75), whether demand conditions are relatively stable (para. 77) and whether the exchanged data is equally accessible to buyers (para. 84). Van Bael & Bellis considers that all of these factors could also form part of the legal and economic context that must be considered when assessing whether there is a restriction by object. Although the Commission states that these factors should only be assessed in considering a restriction by effect, it is nevertheless helpful that the Commission sees such factors as relevant to the assessment of information exchanges. At the same time, however, the Commission explicitly points to the fact that not all relevant characteristics of the information exchange are discussed (Draft Horizontal Guidelines, footnote 52). This raises the question which other factors the Commission may deem relevant for the assessment of information exchange agreements.

Overall, whilst the Draft Horizontal Guidelines provide extensive guidance on how the effects of an information exchange should be assessed and balanced, it remains

⁷ *Ibid.*, para. 37.

largely silent on the crucial distinction between exchanges that are restrictions by object and those that have to be assessed on the basis of their effects. The uncertainty around this distinction has been the root of some of the major issues with information exchanges in practice and it is disappointing that the Commission has not provided more clarity here.

IV. RESEARCH & DEVELOPMENT AGREEMENTS

1. *Conditions for exemption of R&D agreements under the Draft R&D BER*

Van Bael & Bellis is concerned with the increased severity of the Draft R&D BER as regards the conditions for exemption of R&D agreements. Thus, the condition laid down at Article 3(3) that all the parties to the agreement receive "*equal*" access to the results of the research and development is highly questionable. The Commission does not define or otherwise explain the notion of equal access and it is not clear whether it covers equality in the content of the results accessible, equality in the terms of access to these results, or whether it would allow disparities in the level of investment by parties to be compensated through differing access terms. If this latter interpretation were to be rejected, such a requirement of equality would act as a major disincentive to innovation by dissuading companies from embarking upon R&D agreements based on major asymmetric contributions.

Moreover, Van Bael & Bellis submits that the Draft R&D BER should provide for exceptions to the condition of equal access at least in two situations. First, where the agreement provides for joint exploitation, in particular in the form of specialisation in the exploitation of results within the meaning of Article 1(13) of the Draft R&D BER, the Draft R&D BER should make clear that equal access for the purpose of exploitation would not have to be granted until after the end of such joint exploitation. Second, as field of use restrictions seem to be exempted under the Draft R&D BER (see Article 1(13) of the Draft R&D BER), the parties to an R&D agreement should be allowed to provide that access to the results is limited to one or more fields of use.⁸

The increased severity of the Draft R&D BER as regards the conditions for exemption of R&D agreements is further reflected in the elimination of the possibility to exclusively allocate the exploitation of the results of the R&D to one party within the EU (Draft R&D BER, Recital 15 and Article 1(13)). It is submitted that this absolute prohibition is unduly restrictive. It should be noted that such an approach would hamper – with no obvious competition policy reasons – the conclusion of R&D agreements on a global scale between, for instance, EU-based and U.S.-based companies even though these companies may not compete with each other. This absolute prohibition is also difficult to reconcile with paragraphs 141 and 142 (examples 2 and 3) of the Draft Horizontal Guidelines where the Commission seems to take the position that exclusive exploitation rights (at least for the duration of the patent) would be unlikely to give rise to restrictive effects on competition within the meaning of Article 101(1) TFEU where they are necessary for one party to make the considerable investments required by the project and the other party has no own marketing resources (i.e. where the parties bring complementary resources and skills to the cooperation).

⁸ It should be noted that, if the first exception is introduced (namely that equal access for the purpose of exploitation would not have to be granted until after the end of joint exploitation), there would be no need to introduce the second exception insofar as field of use restrictions amount to joint exploitation of the results of the R&D.

Moreover, Van Bael & Bellis notes that, in order to benefit from the Draft R&D BER, each of the parties must carry out some of the research and development activities and that this does not include "a scenario where one party carries out all the research and development and the other party merely finances these activities or exploits the results" (Article 1(12) of the Draft R&D BER). While such a scenario could arguably not be considered as joint R&D, Van Bael & Bellis submits that a (relatively common) scenario where one party carries out the research and development activities on the basis of necessary intellectual property rights and/or know-how provided by the other party, which otherwise only finances and/or exploits the results should, however, be included in the definition of "specialisation in research and development" as it is liable to generate the same benefits.

Finally, Van Bael & Bellis notes that, in order to benefit from the Draft R&D BER, the parties to an R&D agreement must "disclose in an open and transparent manner all their existing and pending intellectual property rights in as far as they are relevant for the exploitation of the results by other parties" ((Article 3(2) of the Draft R&D BER). It would be preferable to replace the word "relevant" by a more precise term, such as "necessary" or "indispensable", in order to avoid any attempt to use R&D agreements with a view to accessing a competitor's proprietary information and business secrets.

2. Hardcore restrictions

Van Bael & Bellis welcomes the modifications made to Article 5 of the Draft R&D BER which clarify the list of hardcore restrictions with respect to R&D agreements. Van Bael & Bellis, however, recommends that, by analogy with the rules on Vertical Restraints⁹, the Commission should allow bans on passive sales for new products or processes for 2 years, at least between non-competitors.

Also, Van Bael & Bellis would urge the Commission to nuance the hardcore restriction covering any "*limitation of output and sales*" which is very broad and could potentially encompass a wide range of provisions even though their potential negative effect on competition (if any) would be largely counterbalanced by their positive effects. Thus, field of use provisions should be expressly excluded from the scope of Article 5(b) or otherwise they could be seen as a limitation of output and sales (see also our comment under point 1 above in relation to the obligation to have equal access to the results).

In the same vein, we would urge the Commission to clarify the treatment of non-compete obligations as they otherwise risk in practice being considered unexemptable under a broad interpretation of this hardcore restriction. However, such a broad reading cannot presumably have been the intention of the Commission as, for example, at least certain restrictions on carrying out competing R&D activities are exempted by the draft R&D BER (which follows, a contrario, from Article 5(a)). The Draft Horizontal Guidelines do not provide any framework of analysis to assess the compatibility of non-compete obligations. Taking into account the apparently rather inconsistent approach the Commission has taken to this important issue in the past,¹⁰ this creates significant legal uncertainty since non-compete obligations may

⁹ See paragraph 61 of the Guidelines on Vertical Restraints.

¹⁰ See, e.g., *TPS* where the Commission considered a non-compete obligation as ancillary to the creation of the joint venture during the joint venture's crucial launch phase, which was estimated at three years (Case No. IV/36.237 - *TPS*). In comparison, in the pharmaceutical sector, the Commission exempted a joint venture agreement containing non-compete obligations for 12 years (Case No. IV/34.776 -

be critical to the business case for proceeding with horizontal cooperation agreements. The Commission should therefore expand on this issue in the Horizontal Guidelines.

3. Conclusion on R&D agreements

In conclusion, while Van Bael & Bellis welcomes overall the clarifications introduced by the draft R&D BER, Van Bael & Bellis would call for more flexibility in the treatment of R&D agreements. It is submitted that the above-mentioned conditions for exemption imposed by the Draft R&D BER are unduly strict. This is even more so when the R&D agreement is concluded between non-competitors or between companies that would not be able to carry out the necessary R&D independently. Some restrictions which may potentially give rise to restrictive effects when concluded between competitors are unlikely to be harmful when concluded between non-competitors. For these reasons, Van Bael & Bellis believes that the Draft R&D BER could be considerably improved by introducing a distinction between R&D agreements concluded between competitors and R&D agreements concluded between non-competitors, as is already the case in the Commission's block exemption regulation and guidelines relating to technology transfer agreements.

V. SPECIALISATION/PRODUCTION AGREEMENTS

1. Scope of exemption

Van Bael & Bellis welcomes the extension of the scope of application of the Draft Specialisation BER to partial termination of production in the context of specialisation agreements. However, Van Bael & Bellis does not understand the reasons why horizontal subcontracting agreements with a view to expanding production are excluded from the scope of application of the Draft Specialisation BER (see Draft Horizontal Guidelines, para. 146). Such exclusion could lead to the undesirable result that the parties to a subcontracting agreement would jointly agree to limit production in order to benefit from the block exemption.

2. Hardcore restrictions

Van Bael & Bellis observes that the hardcore restrictions covering any "*limitation of output and sales*" or "*allocation of markets or customers*" are broadly worded. It may be worth nuancing such wording given that there may be provisions that, while technically qualifying as a "*limitation of output and sales*" or "*allocation of markets or customers*", might in some cases be capable of producing positive effects that would counterbalance the negative effects on competition. Thus, field of use provisions

Pasteur Mérieux-Merck) and, in a different case, accepted a non-compete obligation for a period of 20 years (plus 3 years post-termination) (Case COMP/37.590 - *Pfizer/Aventis*). Furthermore, given the frequent difficulty in distinguishing between full function and non-full function joint ventures (which is acknowledged at para. 30 of the Draft Horizontal Guidelines), it is regrettable that, whereas the Commission unequivocally accepts the validity of non-compete obligations applicable to controlling parents for the full life of a full function joint venture qualifying as a concentration (see, the 2005 Ancillary Restraints Notice, at para. 36), it nonetheless provides no specific guidance at all in respect of such obligations in the context of non full-function joint ventures thereby enhancing the risk of them being branded a hardcore restriction.

should be expressly exempted or otherwise could be seen as an allocation of markets or customers or even as a limitation of output and sales. In the same vein, we would urge the Commission to clarify the treatment of non-compete obligations under Article 101 TFEU. Indeed, as already mentioned above in the context of R&D agreements, the Draft Horizontal Guidelines do not indicate how non-compete obligations should be treated in the context of horizontal agreements and this creates significant and undesirable legal uncertainty.

VI. COMMERCIALISATION AGREEMENTS

Van Bael & Bellis regrets that the Draft Horizontal Guidelines do not contain a clearer approach with respect to distribution agreements between competitors. These rather common types of horizontal cooperation agreements remain difficult to assess in the light of the Draft Horizontal Guidelines. We would urge the Commission to specifically confirm the assessment of non-reciprocal distribution agreements between competitors. It is our understanding that, in principle, such common arrangements will not be problematic where the parties' market shares are no higher than 15%. It would be helpful to confirm specifically the following :

- (i) the fact that the appointed distributor will control the pricing of its own products as well as the competing supplier's products distributed through it will not qualify as price fixing;
- (ii) the discussion of commonality of costs is not relevant for distribution agreements (even above the 15% safe harbour); and
- (iii) a distribution arrangement does not normally involve a sensitive information exchange just because one supplier is selling its products to a competitor as distributor (even above the 15% safe harbour).

It would be very helpful if an example were included to cover these arrangements, which are by the far most typical type of joint commercialisation agreement in practice.

In addition, further guidance (from a horizontal perspective) is desirable concerning the types of specific contractual restrictions that may be imposed in non-reciprocal distribution agreements between competitors. Thus, for instance, while restrictions on passive sales are mentioned in the Draft Horizontal Guidelines as vertical restraints having restrictive effects on competition (Draft Horizontal Guidelines, para. 234), nothing is expressly said concerning restrictions on active sales in distribution agreements between competitors. It is not clear whether such restrictions on active sales could be seen as reducing "*the decision-making independence of one of the parties with regard to entering the other parties' market by limiting its incentives to do so*" and as such "*likely to give rise to restrictive effects on competition*" (Draft Horizontal Guidelines, para. 233).

Similarly, while resale price maintenance is also mentioned in the Draft Horizontal Guidelines as a vertical restraint having restrictive effects on competition (Draft Horizontal Guidelines, para. 234), nothing is expressly said concerning maximum or recommended prices in distribution agreements between competitors.

Finally, the Draft Horizontal Guidelines do not deal with agency agreements concluded between competitors.

In the interest of legal certainty, Van Bael & Bellis therefore recommends that the Horizontal Guidelines set out the Commission's reasoning with respect to these important issues and their effects on competition.

VII. STANDARDISATION AGREEMENTS

In general, Van Bael & Bellis welcomes the revised section on standardisation agreements and appreciates the considerably more detailed and in-depth analysis on the special features of standard-setting procedures the Commission now provides compared to its previous Guidelines.

In particular, Van Bael & Bellis welcomes the detailed guidance set out in the Draft Horizontal Guidelines as to how the internal procedures of standard-setting organizations should be arranged in order for the selection process to be considered acceptable under Article 101 TFEU. This is likely to increase legal certainty and predictability of the Commission's enforcement practices in the field of standardisation. However, Van Bael & Bellis has certain reservations concerning the position advocated in the Draft Horizontal Guidelines in relation to *ex ante* disclosures of licensing terms. Indeed, the Draft Horizontal Guidelines seem to suggest that a rule of a standard-setting body by which IPR holders may, or are even required to, disclose their licensing terms and/or royalty rates prior to the adoption of a standard is not likely to create any competition concerns provided that these practices do not entail joint negotiations or discussions on the licensing terms. Van Bael & Bellis recognizes the positive effects created by *ex ante* disclosures of licensing terms and appreciates the clarification of the Commission's position *vis-à-vis* such practices. Nevertheless, this rather encouraging statement is likely to create uncertainty as to whether a rule of a standard-setting organisation prohibiting all *ex ante* commercial discussions (including unilateral disclosures) would now risk being seen as anti-competitive. A further clarification in this respect would thus be recommended.

The Draft Horizontal Guidelines attempt to provide some guidance on how to determine whether fees imposed for patents in the standard-setting context are unfair or unreasonable, i.e. excessive. In this respect, the Commission suggests that the comparison of *ex ante* and *ex post* royalty rates may be a feasible method to assess whether the fees charged by the holder of the essential IPR bear a reasonable relationship to the economic value of the patents. Van Bael & Bellis would like to point out some shortcomings related to the application of this test. In particular, such a comparison fails to take into account that there may be justifiable reasons for charging different (higher) royalties *ex post* compared to the fees charged *ex ante*. Indeed, in certain circumstances, it may be possible to establish the full commercial value of a particular technology only after the standard has been set. Taking into account the dynamic nature of a standardisation process, it is an inherent feature in this system that licenses negotiated at different times may have a different commercial value. Moreover, the holders of the essential IPR should be able to reward early adopters of their technology by giving them preferential licensing terms without this being seen to amount to abuse of a dominant position.

On a more general level, it should be noted that the inclusion in a standard of a particular technology may as such increase the value of that technology, and consequently the royalty rates, without there being any opportunistic behaviour from the part of the owner of the technology. Indeed, a high royalty rate is not necessarily a sign of excessive pricing practices but an indication that patent law is functioning properly by rewarding innovators for their successful technological developments.

Consequently, it is submitted that the Commission should to the maximum extent possible refrain from acting as a price regulator and in particular be wary of any rent-shifting exercise between innovators and implementers of IPR. Moreover, other constraints faced by the holder of the essential IPR in the context of standardisation should also not be underestimated. With respect to a standard comprising of several complementary technologies, the royalty rate one company can charge for its technology is naturally limited by the prices charged by the other IPR holders. In addition, due to the dynamic nature of standards especially in the high-technology sector, a firm behaving in an opportunistic manner also risks seeing its technology excluded from any future standards.

Overall, many of the Commission's competition concerns relating to standardisation appear to be principally linked to the possibility of the holder of the essential IPR in a given standard abusing its dominant position after the industry has been locked-in to the standard in question. Although Van Bael & Bellis acknowledges the risks for abusive behaviour inherent in standardisation, it can however be questioned whether guidance related to the application of Article 101 TFEU is the best instrument to tackle and prevent such abuses. Indeed, the fact that the rules of a standard-setting body may not in all circumstances be able to prevent a participant from abusing its dominant position after a standard has been adopted should not make those rules and related procedures anti-competitive as such. Instead, such abusive behaviour should be condemned (solely) under Article 102 TFEU. In any event, no liability for abusive behaviour committed by a participant in a standard-setting procedure should be attributed, even indirectly, to the standard-setting organization on the basis that its internal rules were not able to prevent such abuses from taking place.

VIII. CONCLUSION

Van Bael & Bellis welcomes the Commission's initiative to open to consultation its draft legislative package on horizontal cooperation agreements. Overall, the draft legislative package may be regarded as clarifying and, on specific issues, improving the current Horizontal Guidelines and R&D and Specialisation BERs. Nevertheless, Van Bael & Bellis considers that further improvements could be made by implementing the proposals and taking heed of the observations submitted in this document.

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