

Comments on DG Competition's proposed revised framework for the assessment of horizontal cooperation agreements under EU competition law^{*}

Introduction

As a firm actively advising its clients on their R&D and production strategies, White & Case LLP welcomes the opportunity to comment on DG Competition's ("DG COMP") proposed revised framework for the assessment of horizontal cooperation agreements under EU competition law, namely the revised draft Specialisation and Research & Development ("R&D") Block Exemption Regulations ("BERs") and the draft Horizontal Guidelines ("the draft Guidelines").

On the one hand, while we consider that certain features of the draft Guidelines can be further improved, the concept of having a set of guidelines to assist national courts, companies and their representatives to analyse horizontal cooperation agreements remains sound.

On the other hand, the draft R&D BER is of limited value as we consider that most R&D agreements fall outside of the Article 101(1) TFEU prohibition and do not need to be exempted. Moreover, as the Specialisation BER, which we suspect has languished in a relatively calm backwater over the past decade, may become increasingly relevant as companies come to terms with the current economic climate, it needs to be further amended to make it more widely applicable. We would suggest, in particular, increasing the market-share threshold in Article 3 of the draft BER to at least 25% and amending Article 5 of the draft BER accordingly.

There is also the more general question of whether the R&D and Specialisation BERs are still necessary at all, following the overhaul of the old regime based on individually exempted agreements under Article 101(3) TFEU. Though a full switch to individual assessment based on guidelines would to some extent decrease legal certainty, such an approach would give parties greater flexibility to shape their R&D and production agreements in the most efficient manner, while leaving open the possibility of applying competition rules to potentially problematic horizontal cooperation arrangements.

In any event, the BERs and Guidelines should not be read as prescribing how horizontal agreements should be structured; rather, they are only a promise of no harassment if an agreement is structured in a particular way.

Comments regarding certain aspects of the two draft BERs and draft Guidelines are discussed below.

1. Information exchange

We are pleased to see that the Commission has included a new section on information exchange in the draft Guidelines. We consider that this is very important, considering that

^{*} These comments are offered by the Brussels office of White & Case LLP in response to DG Competition's public consultation and should be used for no other purpose, either by DG Competition or by third parties. They do not represent the views of the Firm or of its clients.

the Commission is increasing its focus on information exchanges, and companies face extremely high fines where an infringement is found to exist.

We are pleased to note the case-by-case approach in determining whether an exchange of information distorts competition, as provided for by the Maritime Transport Guidelines.¹ It is also helpful that the draft Guidelines provide more detail when explaining the circumstances in which a collusive outcome or anticompetitive foreclosure might arise and when an information exchange may meet the four cumulative conditions established by Article 101(3) TFEU.

That said, we consider that the examples designed to assist the practical application of the Commission's guidance would be more useful if they covered more borderline situations. As they stand, the scenarios provided are so simplistic as to be unhelpful.

Type of Information Exchanged

Although we believe the draft Guidelines provide helpful guidance on the assessment of information exchanges, there are still some areas in which further clarifications would be useful.

We believe, for example, that the draft Guidelines do not provide adequate guidance for undertakings and their counsel to assess the level of aggregation that would be acceptable to the Commission in any particular case. Although an example is provided (Example 4), that example is one which concludes by stating that “[i]n this case, since the parties form a tight, non-complex and stable oligopoly, even the exchange of aggregated data may lead to a collusive outcome if it allows the parties to set a focal point for coordination”. We feel that it would be helpful for the Commission to provide hypothetical examples of instances where the exchange of aggregated data would not amount to an infringement of Article 101(1) TFEU and which set out in detail the Commission's analysis in reaching such a conclusion.

Another instance where the draft Guidelines provide insufficient guidance is regarding the age of the data. We agree with the premise that the age of the data should be assessed in light of the “*specific characteristics of the relevant market.*”² However, we believe that it would be helpful if the Commission established a clearer safe harbour. The Guidelines refer to past Commission decisions where it was found that data which was more than a year old was historic,³ but later state that data “*can be considered as historic if it is several times older than the average length of contracts in the industry*” and refer to data that is more than three years old in Example 5. Since in many industries contracts are concluded on an annual basis, this could suggest that in certain cases, data more than a year old may not be considered historic. We think that this approach is unduly cautious.

We also consider that in many industries, exchanging data that is less than one year old will not have any anticompetitive effect. We would recommend that the Commission provide

¹ Guidelines on the application of Article 81 of the EC Treaty to maritime transport services, OJ [2008] C 245/2.

² Draft Guidelines, paragraph 86.

³ Draft Guidelines, footnote 57, referring to Commission Decision of February 17, 1992 in Cases IV/31.370 and 31.446 - UK Agricultural Tractor Registration Exchange, OJ [1992] L 68/19, paragraph 50; Commission Decision of November 26, 1997 in Case IV/36.069 — Wirtschaftsvereinigung Stahl, OJ [1998] L 1/10, paragraph 52.

examples of exchanges of data of less than one year, and indicate the cases where this would not be objectionable.

Information Exchanges in the Context of a Regulatory Regime

The draft Guidelines do not provide any guidance for the exchange of information in the context of relationships encouraged by the regulatory regime. The EU REACH Regulation⁴, for example, foresees the possibility of forming consortia for compliance with REACH obligations and under those consortia agreements, undertakings will clearly exchange data. As a result, although the data that would be exchanged would be for the purposes of REACH compliance, some of the data exchanged may raise competition law issues (e.g. sharing data relating to quantities of certain substances within products could lead to disclosure of data regarding production volumes, etc). Due to the Commission's especially keen interest in the chemical industry in terms of antitrust compliance in recent years, it would be helpful for the Commission to provide guidance regarding the exchange of information under these types of agreements. This is all the more important given that the REACH Regulation itself contains a declaration that its application is without prejudice to the application of competition law⁵ and that guidance given by the European Chemicals Agency to date does not actually contain any information for undertakings regarding this type of information exchange and competition law.

Information Exchange as a Restriction of Competition by Object

The draft Guidelines take account of recent developments, including the 2009 *T-Mobile* judgment,⁶ which confirms that certain types of information exchanges will be deemed a restriction of competition by object. At paragraphs 67-68, the draft Guidelines state that information exchanges relating to “*intentions of future conduct regarding prices or quantities*” or “*individualised data regarding intended future prices or quantities*” would fall into this category. In addition, the Commission intends to apply the *per se* treatment to information exchanges “*on current conduct that reveals intentions on future behaviour*” and “*to cases where the combination of different types of data enables the direct deduction of intended future prices or quantities*”, as well as other information exchanges whose “*aim is to restrict competition on the market*”.

In our view, further clarification as to the meaning of these terms is necessary. It is unclear, for example, how the Commission would determine that the “aim” of the information exchange is to restrict competition. We would also find it useful for the Commission to draw a clearer distinction between information exchanges that concern intended future prices and quantities of the companies exchanging the information and those that concern a more general discussion of market trends or estimated future prices. This may be particularly important in the area of exchanges of information for benchmarking purposes, where the

⁴ Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, OJ L 396/1 of December 30, 2006.

⁵ Recital 48 states that “*this Regulation should be without prejudice to the full and complete application of the Community competition rules.*”

⁶ Case C-8/08 *T-Mobile Netherlands*, judgment of 4 June 2009.

Commission accepts there maybe pro-competitive, efficiency-enhancing, reasons for the exchange.

The Commission states at paragraph 9 that the draft Guidelines are “*not intended to give any guidance as to what does and does not constitute a cartel*”. This statement appears to be inconsistent with paragraph 59 which states that “[c]ommunication of information among competitors may constitute an agreement, a concerted practice, or a decision of an association of undertakings with the object of fixing prices or sharing markets or customers. These types of information exchanges run the risk of being investigated and, ultimately, fined as cartels”. Paragraph 59 seems to blur the distinction between information exchanges within a cartel situation and information exchanges outside that situation. We wonder whether perhaps this paragraph should be removed or at least altered to read “*and, ultimately, fined as if it were a cartel*”.

2. Joint Ventures

First, we welcome the fact that paragraphs 11 and 30 of the draft Guidelines attempt to clarify the application of the EU competition rules to joint ventures. We agree with the Commission that in practice, there is often only a fine line between full-function joint ventures that are caught by the EU Merger Regulation and non-full function joint ventures that fall to be assessed under Article 101 TFEU. In that regard, it would be useful if the Commission could provide examples, either in the horizontal guidelines or in a revised version of the Consolidated Jurisdictional Notice,⁷ of cases falling on either side of the dividing line.

Second, we have certain reservations about the fact that the Commission seems to suggest it will treat all joint venture situations in the same manner as parent-subsidary relationships:

“As a joint venture forms part of one undertaking with each of the parent companies that jointly exercise decisive influence and effective control over it, Article 101 does not apply to agreements between the parents and such a joint venture, provided the creation of the joint venture did not infringe EU competition law.”

In support of this proposition, the Commission refers in footnote 7 to the *Avebe* case.⁸ However, that judgment does not create a general presumption that a joint venture and its parent companies form part of a single economic entity. Rather, as the General Court made clear, it was only because the joint venture was “*a purely contractual entity without separate legal personality from its partners*” (paragraph 137 of the judgment) that the Commission was entitled to find that its parents determined jointly the joint venture’s course of action on the market to the point where the joint venture was deemed not to have any real autonomy.

Finally, the wording of this part of paragraph 11 of the draft Guidelines also confusingly suggests that parent companies can always be presumed to exercise control over a joint venture:

“... a joint venture forms part of one undertaking with each of the parent companies that jointly exercise decisive influence and effective control over it ...”

⁷ Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95/1 of April 16, 2008.

⁸ Case T-314/01 *Avebe v Commission* [2006] ECR II-3085, paragraphs 138 and 139.

This part of paragraph 11 of the draft Guidelines should therefore be amended to make clear that the existence of control depends on an assessment of the factual circumstances of each individual case and that no presumption of control exists in line with the Merger Regulation and the Consolidated Jurisdictional Notice.

3. Standardisation

As recognised by the Commission in its recently adopted Digital Agenda,⁹ standard setting is an increasingly important feature of the competitiveness of European industry. It also continues to be at the centre of a number of high-profile antitrust investigations and cases. The interaction between Article 101 TFEU, Article 102 TFEU and intellectual property issues is one of the reasons why this topic has been the subject of some controversy. In that respect, we welcome specific guidance in this area.

However, although we are in favour of specific guidance being published, we question whether these horizontal guidelines are the appropriate means to attempt to provide a solution to a problem which covers a number of complex legal issues. The objective of the horizontal guidelines is to help companies to determine whether certain practices or agreements are likely to fall under Article 101(1) TFEU and, if so, whether such agreements or practices are likely to benefit from the provisions of Article 101(3) TFEU. However, the section dealing with standardisation agreements in the draft Guidelines is heavily influenced by Article 102 TFEU considerations – and in fact, part of the safe harbour requirements are specifically designed to prevent such abuses. Article 102 TFEU is particularly relevant to the standard process generally and no doubt participants in that process would welcome specific guidance on this area of the law, but we believe that the main focus of these Guidelines should be Article 101 TFEU. In that respect, the Guidelines would benefit from more detailed guidance on the relationship between standardisation agreements and Article 101 TFEU, specifically on how standard setting organisations (“SSOs”) and their members can ensure that any practice or agreement in a standard setting context is likely to fall outside Article 101(1) TFEU or how they might benefit from Article 101(3) TFEU.

In view of the complexity and interaction of the legal issues associated with standard setting, we believe that the European Commission should consider a separate initiative dealing exclusively with standard setting with the objective of gathering specialists from all different sectors and publishing specific guidance. In this regard, we note that the Digital Agenda suggests that the Commission may propose legal measures to ensure transparent, *ex-ante*, disclosure rules for essential intellectual property rights and licensing terms and conditions in the context of standard setting.

More specifically, the concept of a safe harbour for standardisation agreements is a helpful step, but as currently defined in paragraph 276 of the draft Guidelines, seems to be too prescriptive. It bears some resemblance to the Commission’s old school “white list” of clauses that had to be included in some agreements to qualify for an exemption under Article 101(3) TFEU. Such a rigid, one-size-fits-all solution, with seemingly prescriptive rules on sensitive issues such as disclosure or licensing terms, does not appear to be practicable considering that some standard setting takes place in a very informal manner, with no strict

⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: A Digital Agenda for Europe, Brussels, 19.05.2010, COM (2010) 245.

procedural rules. A best practice guide for SSOs might be a more appropriate solution if the Commission's goal is to provide detailed guidance.

4. R&D Agreements

We welcome the proposed shortening of the black list included in Article 5 of the draft R&D BER. In particular, the abolition of the 7 year limit on active sales restrictions regarding territories and customers that are exclusively allocated to one of the parties through specialisation in exploitation is a significant improvement.

That said, we note that the Commission proposes changes which narrow the scope of the R&D BER. We believe that the BER could be made more useful by giving parties more freedom in structuring their R&D collaboration, while still providing the clear legal security of a safe harbour. In particular, more deference should be afforded to R&D cooperation between non-competitors as such agreements are almost always pro-competitive, and there is no need to restrict parties' contractual freedom. Introducing new pre-conditions which R&D agreements must satisfy in order to benefit from the block exemption is inconsistent with this objective.

Definitions

The draft Regulation introduces definitions for “*specialisation in research and development*” and “*specialisation in exploitation*”. Both of them unnecessarily narrow the scope of the BER.

The definition of “*specialisation in research and development*” excludes the possibility of one party solely carrying out the R&D and the other only providing financing for the project or exploiting the results. This restriction may limit the available funding for R&D activities and discourage investments in start-ups.

The definition of “*specialisation in exploitation*” appears to require that each party to the R&D agreement exploits “some” of the R&D results and carries out “some” distribution activities in the internal market. Aside from being unclear, this requirement could discourage collaboration between European and non-European companies.

The draft BER defines a “potential competitor” as a company that is likely to enter a market within three years absent the agreement. We believe that a time limit of one year would be more appropriate, especially in technology-based industries. This would also be consistent with the definition of a potential competitor in the current Vertical Guidelines.¹⁰

Pre-conditions for Applying the BER

The conditions for applying the Regulation set out in Article 3 of the Draft R&D BER are in general too prescriptive. The Commission's approach is too cautious considering that the block exemption only applies to agreements between parties with relatively low market shares.

We also consider the new condition for the application of the block exemption, requiring the parties to “*agree that prior to starting the research and development ... (they) will disclose all*

¹⁰ Commission Notice - Guidelines on Vertical Restraints, OJ [2010] C 130/1.

their existing and pending intellectual property rights in as far as they are relevant for the exploitation of the results by the other parties” to be overly burdensome. Together with the Article 3(4) obligation to provide access to “*any pre-existing know-how of the other parties*” if that know-how is indispensable for exploitation of the results of the joint R&D, this unnecessarily limits the R&D block exemption and may discourage pro-competitive R&D cooperation.

Finally, while the current R&D BER only provides that all parties to a R&D agreement must have “*access to the results*”, Article 3(3) of the new draft R&D BER introduces a new requirement providing that all parties must have “*equal access*” to the results of the joint R&D for the purpose of further research and exploitation. The addition of the word “*equal*” in Article 3(3) unreasonably narrows the application of the block exemption. In most collaborations, some participants are better placed to undertake certain tasks in specific areas than others; parties should therefore be able to structure their agreement and allocate revenue and responsibilities accordingly. The general approach should be one of regulatory forbearance: the parties to a *bona fide* R&D agreement should be free to organise the joint exploitation of any results as they see fit.