Practical Considerations of the European Commission's Evaluation of the EU Competition Rules on Horizontal Agreements between Companies

A paper prepared by the European Competition Lawyers Forum[1]

Introduction

1. On 6 November 2019 the European Commission (the 'Commission') launched a public consultation, which is part of the evaluation of the Horizontal Block Exemption Regulations.[2] The aim of the consultation is to collect evidence and views from stakeholders. The ECLF working group on horizontal agreements is grateful for the opportunity to take part in the consultation.

2. The Commission has incorporated an online questionnaire as part of the evaluation. As a working group we felt that it would be less productive to respond to the questionnaire as our experiences and views vary significantly across the group. Instead we have produced a working paper. If the Commission wishes to discuss any parts of the paper in more detail, the ECLF would be happy to engage with the Commission.

Joint Purchasing - horizontal purchasing collaboration

3. Analysis today is focused on downstream impact. Entire industries (for example food distribution) rely on that for joint purchasing. The ECLF is wondering whether there is a need to reconsider the balance between efficiencies created by the joint purchasing and greater buyer power.

4. The ECLF would welcome some clarity on the distinction between legitimate joint purchasing and a buyer cartel, in particular in light of recent enforcement action against a number of buyer cartels in *Car Battery Recycling; Ethylene or Styrene Monomers*. The horizontal co-operation guidelines ('HCG') do not distinguish with sufficient clarity between legitimate joint purchasing and a buyer cartel both of which involve an agreement on the purchase price.[3] The HCG suggests that agreements involving the fixing of purchase prices can be considered a restriction of competition by object where joint purchasing arrangements serve as a tool to engage in price fixing, output

[1] The European Competition Lawyers Forum ('ECLF') is a group of the leading practitioners in competition law from law firms across the European Union. This paper has been compiled by a working group of ECLF members and does not purport to reflect the views of all ECLF members or of their law firms. The views set out in this working paper also do not necessarily reflect the views of each individual member of the working group or of their law firm. A list of working group members is set out at Annex 1.

[2] Commission Regulation (EU) No 1217/2010 (for research and development agreements), and Commission Regulation (EU) No 1218/2010 (for specialisation agreements), together referred to as the 'Horizontal Block Exemption Regulations'.

[3] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements.

limitation or market allocation.[4] This does not apply however where the parties to a joint purchasing agreement agree on the prices the joint purchasing arrangement (for example the buying group) may pay to its suppliers for the jointly purchased products.[5] In those circumstances, an assessment of the anticompetitive effects of the purchasing agreement is required.

5. As joint purchasing involves less coordination than a full merger, ECLF would like to see an increase in the current market share thresholds from 15% to 25% in the upstream and downstream markets. This would be in line with the safe harbour for EU merger control under the EU Horizontal Merger Guidelines. Moreover, a joint purchasing agreement is considered less restrictive of competition than a merger and thus unlikely to have any anticompetitive effect (cf. OFT's comments in its Short Opinion *P&H/Makro*).[6] Alternatively, the Commission should consider increasing the market share threshold to 20% in line with the threshold for the simplified Form CO procedure under the EU merger control regime.

Research and Development (R&D) agreements

6. While the R&D Block Exemption Regulation is a useful source of legal certainty, this Regulation protects only the most obvious pro-competitive R&D agreements. However, there is a large number of R&D agreements that meet the Article 101(3) TFEU criteria, or do not fall in the scope of the prohibition contained in Article 101(1) TFEU at all. The ECLF believes that extended automatic protection, through the Block Exemption, should be considered. Antitrust enforcement against R&D agreements has in fact been very limited, suggesting that there are many agreements that could benefit from a wider and more straightforward safe harbour.

7. Widening and clarifying the scope of the protection would incentivise beneficial cooperation in R&D. We suggest the following:

8. Definition of potential competition. In ECLF's view, two businesses should not be treated as competitors in the innovation space unless their innovation activities are in direct competition with each other. The mere fact that their respective R&D activities seek to achieve similar applications or belong to a common "innovation space" should not suffice. As a matter of fact, the vast majority of R&D endeavours do not start with a clearly defined application in mind, and changes of the ultimate application are likely to occur along the way. Therefore, the sheer ability and/or interest in conducting research in the same "space" is not enough to characterize two undertakings as potential competitors. A more stringent approach to 'potential competition' would lead to fewer instances where the 25% market share threshold for "competing undertakings" set out in Article 4 of the R&D Block Exemption applies.

[4] HCL, paragraph 205.
[5] HCL, paragraph 206.
[6] https://webarchive.nationalarchives.gov.uk/20140402165729/http://oft.gov.uk/shared_oft/SFOs/SFO_on_Joint_Purchasing.pdf.

9. Centre of gravity of an agreement. The ECLF is of the view is that a more flexible approach should be adopted to qualifying agreements as R&D, when those agreements contain provisions for joint exploitation, or are entered into in connection with a joint exploitation agreement. In this regard, the requirement that the results of R&D are "decisive" for the joint exploitation, in order for the "centre of gravity" of the agreement to be on R&D, appears excessive.[7] As long as there is *meaningful* R&D at the centre of joint R&D efforts, the R&D Block Exemption Regulation and HCG should apply. In fact, innovation often takes place in incremental steps. This could mean that agreements to cooperate at steps closer to joint exploitation may not benefit from the safe harbours in the Block Exemption and the HCG, which could stifle beneficial innovation.

10. Market share thresholds. The ECLF notes that the application of market share thresholds is particularly difficult in the case of R&D (for instance, when market share needs to be calculated on the basis of licensing income, and no data is available yet). We submit that the threshold of the R&D Block Exemption should be raised, or even abolished, given the largely positive effects of joint R&D. The current cap of 25% is not indicative of market power: market shares at that level rarely raise significant antitrust concerns, particularly with regard to R&D and innovation.

Information exchanges

11. Information flows in ecosystems: The ECLF is wondering whether the current rules for information sharing/data sharing in cooperation settings (vertical and horizontal) are too restrictive with an effect of impeding innovation and pro-competitive conduct/cooperation.

12. Data increasingly fuel business models, technological solutions and understanding of customers' needs. Thus, collection and sharing of data is a necessary feature of doing business and engaging with partners in both horizontal and vertical settings. However, the current guidance on information exchange is based on information sharing *separate* from integration of business activity (for example old trade association cases).

13. The ECLF is also questioning whether the analysis should be different where business activity is being integrated in particular when IT Platforms have preferential access to 'big data'.

14. The principles on data sharing should be fully aligned with the EU's forthcoming 'industrial strategy' proposals, which are reported to include data pooling provisions. More streamlined rules on the ability to exchange data could stimulate competition by allowing smaller firms to benefit from any potential advantages in 'big data' for example for training machine learning. Guidelines could make clear that non-commercial data could be shared by firms without market power without that resulting in material antitrust risk.

[7] HCG, paragraph 14.

15. Restructuring situations – other situations where complexity of financial and supplier relations require extensive information exchange: When restructuring a large supplier in a multi-tier industry (for example automotive, aerospace, rail) there will be extensive information exchanges among suppliers and other creditors. All have supplied parts or credit at different prices and will have different forward-looking commitments or backwards looking creditor positions. The ECLF is wondering whether the HCG should include provisions on the information exchange between the suppliers and creditors of such complex restructuring, as they must often exchange detailed information on prices of supplies and debt, and agree on who will make what commitments on future prices and credit grants.

16. Ring fencing and safeguards: The HCG do not today provide any safe harbour for so-called 'ring fencing' and clean room measures. The ECLF is questioning whether the HCG should provide safe harbours for such pro-competitive cooperation. Alternatively, it would be good to know whether the Commission would be willing to use an improved guidance letter procedure, [8] in particular in respect to new/important business cooperation areas (e.g. environmental cooperation, new online business models).

17. For example, consider information exchanges in subcontracting or joint supply on very large projects in markets with few suppliers. For example in concentrated market (four suppliers globally but regional production so in reality only (A) and (B) are competitors in EEA). A is capacity constrained, so B is effectively only bidder for years to come. Capacity constrained supplier (A) cooperates with supplier/subcontractor based in another region (C), and helps (C) to achieve requirements of contract. But for this (A) would not be able to bid, and (C) would not have capacity or knowledge on its own. As A and C will be competitors after the current contracts are over, safeguards are put in place to ensure that engineers of A that are working at B do not have access to cost information. They will of course have access to all technical and capacity information as that is why they are on (B)'s site.

18. Pro-competitive technology cooperation driving innovation: The ECLF is wondering whether current uncertainty on substantive rules in technology cooperation in horizontal settings and enforcement risk may deter procompetitive and necessary technology cooperation. Innovation is increasingly cooperative with new technologies being assembled by many individual firms some of which may be close competitors in related activities. In this setting based on *"co-opetition"*, it is arguably important not to deter cooperation between firms that have the capabilities to deliver the new technologies that move markets and enable competition with other firms having a similar focus.

[8] The existing guidance letter procedure needs to be improved to make it is user-friendly, with a view to encouraging greater use, resulting in published real-life examples of cases where the Commission has provided positive guidance (which could for example be subject to monitoring and reporting requirements that are not available in a self-assessment environment).

Technology Licensing and Standardisation

19. The ECLF recognises that standardisation is not the primary focus of the Commission's consultation. Nevertheless, the ECLF proposes that the Commission should focus on clarifying its position on certain existing and very important topics addressed in the HCG.

20. **Enhanced transparency:** The Commission should provide more robust and clear guidance requiring open and transparent standardisation processes. According to the HCG, participants should disclose their IPR that might be essential for the implementation of the standard under development.[9] Such disclosures should be made by patent holders as early as practicable and include all patents and patent applications that could be essential to the developing standard. This would enable stakeholders to make informed choices in terms of both the technology to be included in a standard and the likely cost of including the IPR of a particular patent holder. Further, disclosure of the relevant IPR enables a fair valuation of the actual merits of the specific patents included in the standard.

21. **Open access to all implementers:** The Commission should explicitly recognise that refusal of access to a standard negates the efficiencies for which the exemption under 101(3) TFEU is granted. As a result, all discussions leading to the adoption of a standard as well as the final agreement itself would be scrutinised by the Commission under 101(1) TFEU. SSOs therefore need to ensure that the FRAND commitment entitles each and every implementer of the standard to an exhaustive licence on FRAND terms.

22. **The importance of FRAND commitments:** When revising the HCG, the Commission should underline the multi-faceted benefits of the FRAND commitments. Ensuring that SEPs are licensed on FRAND terms protect implementers both before and after an industry has been locked-in a specific standard. The Commission should recognise that dominant SEP owners have a duty under Article 102 TFEU to comply with their FRAND commitments.

23. The HCG could make clear that the principles on 'standardisation' can be applied to standards beyond technical standards. In modern, fast-moving markets there are many legitimate objectives where government and society looks to industry to act quickly to address an issue. This could include for example online fraud or online extremist messages. Often industry can address these issues most effectively if they are act together to create a common approach and a common standard – without that being any threat to competition. The HCG could make that the 'standardisation'-type principles for example objective standards, open participation etc. can apply equally to result in non-technical standards being low risk from an infringement perspective.

[9] HCG, paragraph 286.

Interface between Horizontal and Vertical Guidelines

24. **Horizontal exchanges of information within the distribution chain:** The ECLF think it would be useful for the Commission to highlight when and under what circumstances (i) exchanges of information (often only one-way) cross the danger zone; and (ii) conduct aimed at overcoming the free-rider problem e.g. online-shopping cannibalization or alignment of investment incentives is illegal. There is a gap between the current Horizontal and Vertical Guidelines. In particular, current Guidelines do not provide guidance on how Article 101 TFEU applies to horizontal AND vertical for example hub & spoke situations or 'click & brick' distribution networks, or platform 'eco-systems'.

Structure of the Block Exemption Regulations

25. ECLF submits that the current Horizontal Block Exemption Regulations are useful but difficult to read and apply. Notably the provisions that care out certain agreements from the general exemption unless specific exceptions apply (for example Article 5 (c) R&D), are difficult to apply in practice. We encourage the Commission to simplify the text of the horizontal Block Exemption Regulations going forward.

26. We query whether it is necessary to include a list of hard core restrictions in the Horizontal Block Exemption Regulations at all. Qualifying certain agreements as hard core will deprive the companies from the benefit of the Block Exemption Regulation in its entirety. This appears excessive where such conduct may underpin beneficial pro-competitive agreements, notably concerning the exploitation of R&D results. We would expect innovators to engage more frequently in joint R&D efforts if they were afforded an effects based analysis of their exploitation plans instead of a set of hard-core restrictions, which operate as presumptions of illegality in practice. This would likely foster, not decrease innovation.

27. As a general point, the ECLF would welcome more clarity, and a sufficiently flexible approach regarding the meaning of 'potential competitor'. The test set out in the HCG is largely based on market definition and is often difficult to apply in practice.[10] In our view, the ability to enter into the market in the short term needs to be evidence-based and not merely speculative. In deciding whether a firm is a potential competitor, there should be evidence of a clear commercial strategy within the business, supported by internal documents showing a clear plan to invest in entering the market. This would be particularly relevant where market impact/results are very difficult to predict, such as R&D.

Digital economy

28. **Additional guidance:** Specific guidance is needed with regards to the digital economy, in particular in relation to the increasing horizontal cooperation concerning data exchanges, Internet of Things, development of new platforms, and AI.

[10] HCG, paragraph 10.

Environmental cooperation and other sustainability objectives

29. **Environmental agreements:** Environmental policy constitutes an ever more important EU objective. Given the urgency and the amount of investment and R&D required, it often requires cooperation amongst competing firms. Guidelines could usefully remind participants how a cooperation can comply with competition rules in such circumstances (for example clean teams are often difficult to implement because key R&D/operational teams cannot be firewalled' from the rest of the business as they are in the M&A context).

30. **Other industry initiatives aimed at delivering sustainability objectives:** A focus on (short-term) price competition risks deterring industry from cooperating in areas which have other (longer-term) socio-economic benefits in line with wider EU policy objectives (e.g. improving working conditions in third countries producing inputs for products sold in Europe, requiring sustainable production of inputs) even if that may increase costs. The review of the HCG provides an opportunity to encourage such initiatives, including between competitors active at the same level in the supply chain, subject to appropriate safeguards.

31. Environmental agreements in particular are an area where businesses could benefit from informal guidance from the Commission. Since there is often less direct financial incentive for business to enter into these agreements than with purely commercial initiatives – businesses often want complete certainty that there are no legal risks. Therefore, it would be beneficial for the Commission to make clear that informal guidance is available, especially for environmental agreements.

Annex 1: Members of the ECLF working group on horizontal agreements:

- **British Institute of International and Comparative Law:** Dr Liza Lovdahl Gormsen (chair)
- **Baker McKenzie:** Werner Berg
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